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August 6, 2010

By FedEx #798919004246

The Honorable Barbara A. Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, NW
Washington, DC 20460-2001

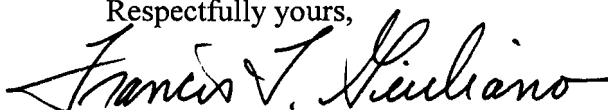
Re: *U.S. Environmental Protection Agency v. The Okonite Company, Inc.*
Docket No. TSCA-02-2010-9104

Dear Judge Gunning:

Pursuant to the Prehearing Order of May 4, 2010, and Your Honor's Order dated July 21, 2010 granting an extension to August 13, 2010, we enclose an original and copy of the Prehearing Exchange of The Okonite Company, Inc.

We appreciate the Court's courtesies.

Respectfully yours,



Enclosures
G102130/F126A

cc: Karen Maples, Regional Hearing Clerk (by FedEx #793795221764) (w/encs.)
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor, New York, NY 10007-1866

Karen L. Taylor, Esq., Office of Regional Counsel (by FedEx #793795122140) (w/enc.)
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U.S. ENVIRONMENTAL
PROTECTION AGENCY
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NEW YORK, NY

In the Matter of The Okonite Company, Inc.
Docket No. TSCA-02-2010-9104

CERTIFICATE OF SERVICE

This is to certify that on the 6th day of August, 2010, I have forwarded for filing and service true and correct copies of the foregoing Prehearing Exchange, bearing Docket No. TSCA-02-2010-9104, to:

The Honorable Barbara A. Gunning (By FedEx #798919004246)
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Patricia Astone

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

-----X
In the Matter of: :
The Okonite Company, Inc., : Docket No. TSCA-02-2010-9104
Respondent. : The Honorable Barbara A. Gunning
Proceeding under Section 16(a) of : Presiding Officer
the Toxic Substances Control Act. :
-----X

U.S. ENVIRONMENTAL
PROTECTION AGENCY
REGIONAL HEARING
OFFICE
2010 JUN 10 11 04:15

RESPONDENT'S PREHEARING EXCHANGE

Respondent, The Okonite Company, Inc., herewith submits this Prehearing Exchange in accordance with 40 C.F.R. Section 22.19(a) and the Order of this Court, dated May 4, 2010.

I. PRELIMINARY STATEMENT

Okonite submits that the dispositive issue in this case is a question of law. Okonite also submits that the EPA, in its Prehearing Exchange, has conceded the accuracy of Okonite's position on the legal issue, and that therefore there is no longer any basis for the EPA to continue to prosecute this action. (See Part II, Section C (at p. 8) of Okonite's Prehearing Exchange.)

Procedurally, the main facts giving rise to the dispute are few, straightforward and not in dispute. Okonite owns a three-story office building in Ramsey, New Jersey, situated by itself on an approximately 20-acre site. Okonite employs approximately 100 people in this building. A small utility building on the site houses the chiller for the air conditioning system in the office building, and little else. The office building and the utility building are each served by one PCB transformer.

Okonite failed to register these transformers with the EPA as required by 40 C.F.R. §761.30(a)(1)(vi)(A) by December 28, 1998. However, Okonite did register both transformers, and did so voluntarily, on April 5, 2005. Okonite Exhibit 1.

Then, some four years later, EPA representatives made an unannounced visit to Okonite, inspected the transformers, and generally, undertook the activities described in the Inspection Report annexed to the EPA's Prehearing Exchange as Exhibit 1. Informally, the EPA representatives expressed to Okonite's representative on completion of the inspection that Okonite's PCB transformers were exemplary in their compliance with the physical condition, labeling, inspection and record keeping requirements of 40 C.F.R. §761.30(a). The EPA Inspection Report is consistent with the inspectors' compliments expressed to James J. Groome, Okonite's Director of Safety and Environmental Programs.

Nevertheless, the EPA representatives advised informally as well that their position was that the transformers would have to be decommissioned and removed from service, or retrofilled.¹ That position was reiterated in the Notice of Opportunity referenced in the EPA's Prehearing Exchange, and was the purpose of and the reason why the EPA filed the instant formal Complaint.

The instant Complaint is thus not brought to attempt to cure unsafe conditions or non-compliance with the law governing the physical, labeling, inspection and record keeping requirements for PCB transformer use. Moreover, as will be shown subsequently in this submission,

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Okonite has determined that retro filling is neither practical nor cost effective. Retro filling would have to be done a number of times to hopefully reduce PCB concentration to levels where the transformers in question would not be "PCB transformers." Even assuming retro filling could achieve the required reduction in concentration, the cost would be substantially the same as decommissioning and replacing the transformers which are the subject of this proceeding. Therefore, no further reference is made to retro filling in Prehearing Exchange.

and in the trial brief Okonite submits before the trial of this matter, the EPA does not seek to impose a fine on Okonite for late registration of the transformers. To be sure, EPA seeks a fine in this matter, but only to serve its ultimate goal of compelling Okonite to decommission and to remove from service now, the one PCB transformer which services the office building, and the other PCB transformer which services the utility building, approximately 400 feet away from the office building.

The legal premise underlying the EPA's demand for removal of the transformers from service was its position that Okonite's voluntary registration of the two transformers on April 5, 2005 was a meaningless act. The EPA contended that once December 28, 1998 came and went, with Okonite having failed to register the transformers, they then immediately became illegal, and absolutely nothing that Okonite did, might do or could do subsequently could make them legal again. Therefore, the EPA's position, adopted for the first time some four years after registration, was that Okonite's voluntary registration of the two transformers on April 5, 2005 was a nullity, entirely without legal effect under the law.

Were the EPA to prevail in that position in this action, it would in effect have obtained a declaratory judgment that Okonite is operating the two transformers in question illegally, and that Okonite must then remove them from service or continue to be fined. That is the reason why the single date of violation alleged in the Complaint is May 7, 2009. EPA Prehearing Exchange, p.12. Since that date is more than four years after Okonite registered the transformers, were the EPA to prevail in this case it would have obtained an adjudication for all practical purposes that Okonite's registration was not legally valid when it was done, and nothing Okonite did since could make it legal.

For its part Okonite seeks only to continue to operate the two transformers until the end of

their respective useful lives, which 40 C.F.R. §761.30 allows. At that point Okonite would decommission and remove the transformers, and replace them with new, non-PCB units. As noted above, Okonite's compliance with the physical maintenance, labeling, inspection and record keeping mandates of 40 C.F.R. §761.30(a) has been exemplary. Were Okonite to prevail in this case, Okonite acknowledges, and has by its conduct involving the transformers already acknowledged, that it is obligated under the law to continue to comply with the mandates of §761.30 to the end of the useful life of each transformer.

At trial, Okonite will adduce factual evidence explaining that its failure to register the transformers stemmed from error, and was not caused, as is often seen in the reported cases, by an essentially obstinate refusal to accept or comply with an environmental regulatory scheme. To the contrary, the evidence at trial will show that Okonite pursues a Company policy of 100% compliance with all environmental regulations applicable to its activities, and that Okonite goes further and actively participates with the EPA in various affirmative environmental initiatives beyond those required by regulation. Indeed, the EPA itself has conferred awards on Okonite, formally acknowledging Okonite's voluntary, affirmative contributions to various of the EPA's initiatives. Exhibits 2 and 3.

Returning to the discussion of the legal issue originally posed by this case, Okonite will contend in its trial brief, and at trial of this matter, if the matter proceeds that far, *inter alia*, that (1) the original EPA legal position was inconsistent with and in fact violative of the policies underlying Section 6(e)(2)(B) of TSCA, (15 U.S.C. §2605(e)) and 40 C.F.R. §761.30; (2) that no reported decision of the EPA, or of the law courts, has construed 15 U.S.C. 2605(e) or 40 C.F.R. §761.30 to give them the meaning or effect the EPA originally communicated to Okonite; (3) that to the contrary, a decision of the Environmental Appeals Board is directly in point and rejects the

construction of 40 C.F.R. §761.30 that the EPA expressed to justify its demand that Okonite remove the transformers from service; and (4) nothing in the language of 40 C.F.R. §761.30 establishes that the registration requirement in 40 C.F.R. §761.30(a)(1)(vi)(A) should be treated any differently than the other requirements which if violated can nevertheless be met by curative action.

II. ADDITIONAL BACKGROUND INFORMATION,

EPA'S CONCESSION OF THE INVALIDITY OF ITS POSITION

and

OKONITE'S WITNESSES

A.

ADDITIONAL BACKGROUND

1.

Okonite will adduce evidence at trial describing certain parameters of its use of the two transformers in question. As the EPA correctly noted in its inspection report (See EPA Exhibit 1, p.1, ¶3), Okonite performs no manufacturing operations at its Ramsey office building. The building is used only for customary office purposes, and only 100 or so employees work there. The transformer that serves this office building is very lightly loaded electrically.

Okonite is one of the earliest employee owned companies ("ESOP") in the United States, and has been successful in that form of ownership. Okonite is a small company, by any recognized measure (*e.g.*, approximately 1,100 employees in total throughout the United States), and operates for the benefit of its employee owners. The Ramsey office conducts the Company's centralized administrative functions, for Okonite's factory in Paterson, New Jersey and its factories, warehouses and offices in the other states. The importance of those administrative functions requires that there be no cessation of electrical power at the Ramsey office building. For these reasons the viability and integrity of the transformer which serves the Ramsey office includes but goes well beyond the need

to comply with all physical safeguards/inspection/ reporting requirements of 40 C.F.R. §761.30. This is just one among several reasons why when the EPA conducted its unannounced inspection on May 9, 2009 it found that Okonite's compliance with the mandates of §761.30 was exemplary, and even exceeded certain of those mandates.

The second of the two transformers which are the subject of these proceedings, namely, the transformer which serves the utility building is also lightly loaded electrically. The only electrical demand in the utility building is the chiller for the air conditioning system of the main building, several pumps, and minimal, ordinary lighting in the utility building. Okonite maintains that transformer with the same meticulousness it applies to the main building transformer.

2.

Okonite's failure to register the Ramsey transformers stemmed from innocent error, and was voluntarily corrected when the error was discovered.

The evidence at trial will tend to show the following. James J. Groome is Okonite's Director of Safety and Environmental Programs. Mr. Groome was hired on March 28, 1994. Previously Mr. Groome was employed by the New Jersey Department of Environmental Protection for approximately seven years, his final capacity there being that of Bureau Chief. Before he was hired, Okonite did not have any employee trained or experienced in environmental science. Okonite hired Mr. Groome to cure this deficiency, and establish and administer company-wide environmental programs to ensure Okonite's compliance with all environmental laws applicable to Okonite's operations. In the course of being trained about the Company's operations and facilities, Mr. Groome was presented with lists of the Company's PCB transformers at the Company's factories. Mr. Groome was given no such list for the Ramsey transformers. Based on the nameplate it was believed by those conducting Mr. Groome's training that the Ramsey transformers were not PCB

transformers.

The EPA's Prehearing Exchange makes reference to certain issues involving PCB transformers at Okonite's Paterson, New Jersey factory. These issues arose in 2004 and were resolved by Okonite and the EPA entering into an SEP, followed by Okonite's complete and strict performance of all its obligations under the SEP. However, as a result of the transformer issues in Paterson in 2004 and 2005, Mr. Groome undertook a reevaluation of all transformers company wide. In so doing, Mr. Groome learned that the Ramsey transformers did in fact contain PCB dielectric fluid, that they in fact met the definition of "PCB transformers" in the regulations, and forthwith registered them on April 5, 2005 and instituted all the programs found by the EPA when it inspected the transformers some four years later, on May 7, 2009.

Okonite takes strenuous exception to the following statement in the EPA's Prehearing Exchange:

" * * * EPA can expect that Respondent knew that the transformers in question [were] PCB Transformers because the nameplate indicated that they were 'ITE' transformers filled with 'non-flammable liquid.' * * * " EPA Prehearing Exchange, p.10, mid-paragraph.

To the contrary, the evidence will show that this information on the nameplate contributed to the understanding that the Ramsey transformers did not contain PCBs.

After Okonite registered the Ramsey transformers with the EPA on April 5, 2005, it never again heard from or had any contact with the EPA concerning them until four years later. When the EPA made its unannounced visit to the Ramsey office on May 7, 2009, the transformers were in total compliance with all the mandates for physical safety, marking, pad mounting and berming, inspection and record keeping, and had been in such total compliance at least since the date they were registered four years earlier. Nothing about the EPA inspection on May 7, 2009 led to any

accusations of non-compliance, notices of violation or any other enforcement action against Okonite. Nothing the EPA learned in its inspection of May 7, 2009 led to the instant enforcement action. Instead, the EPA brought the instant enforcement action based not on the inspection but on a failure occurring eleven years earlier, which the EPA articulated was not cured by the registration in 2005, and which, the EPA claimed then could never be cured.

B.

EPA'S CONCESSION OF THE INVALIDITY OF ITS LEGAL POSITION

The nub of the dispute between the parties has been the EPA's view that as of December 28, 1998 Okonite's violation was complete, fixed and final, and Okonite's view that it found and corrected its error, and that from the time it registered the transformers on April 5, 2005, they have been and remain in compliance with 40 C.F.R. §761.30(a). This issue has already been adjudicated by the Environmental Appeals Board, and it has been adjudicated in Okonite's favor.

The case of In re Lazarus, 7 E.A.D. 318 (1997), together with its progeny, constitute a body of law which is consistent with and which supports Okonite's contention that the obligation to register the transformers is a continuing obligation, and once the obligation is fulfilled, the transformers come into compliance with the law. Because of the importance to the instant matter of the Lazarus decision, Okonite undertakes a fuller discussion of it subsequently in this Prehearing Exchange. (See p.12) Okonite notes here however, that in its Prehearing Exchange the EPA refers to Lazarus twice. In one of those references, in manifestly admirable candor and professionalism, the EPA correctly describes the holding of Lazarus. On page 11 of the EPA Prehearing Exchange, in the second full paragraph, the EPA states:

“Because the PCB Transformer registration requirement is a condition of authorization for continued use of the PCB Transformers, it is continuing in nature. In re Lazarus, 7 E.A.D. 318, 319 (1997).” (Emphasis supplied.)

This statement in the EPA's Prehearing Exchange that the requirement to register PCB transformers is a continuing one, is correct. This has been Okonite's position since the inception of the disagreement with the EPA. The registration requirement is continuing in nature. Okonite fulfilled the requirement by registering. The EPA has now conceded that point. Given this concession, Okonite's transformers were in compliance with the law on May 7, 2009, the sole date on which the instant Complaint is premised. There is thus no basis on which this case should continue.

The other reference to Lazarus in the EPA's Prehearing Exchange is as follows: "Unauthorized use is a continuing violation. In re Lazarus [cite omitted]." EPA Prehearing Exchange, p.11, ¶1. If Okonite had not registered its transformers on April 5, 2005, and continued to use them without registration until May 7, 2009, then on May 7, 2009 their use would have been unauthorized. But the undisputed fact is that the transformers had been registered for more than four years by May 7, 2009. Since Lazarus held, and the EPA concedes, that the obligation to register the transformers was continuing, then it follows that fulfilling the obligation brought the transformers into compliance with §761.30(a) and their use was then authorized by §761.30(a).

As against the possibility the EPA may continue to prosecute this matter, Okonite submits here the balance of its Prehearing Exchange.

C.

OKONITE'S WITNESSES

Okonite may call the following as witnesses on its behalf:

1. Arthur V. Pack, Jr. Mr. Pack is employed by Okonite as Vice President of Engineering. Mr. Pack is an electrical engineer, and is a licensed P.E. in New Jersey and Pennsylvania. Mr. Pack's testimony will address the facts referenced above that the Ramsey

transformers are both lightly loaded, the significance of their being lightly loaded, and may address other operating characteristics and functional parameters of the transformers, particularly in the context of Okonite's use of its Ramsey facility for general corporate purposes. Mr. Pack's testimony may be both factual and expert. Because of the latter possibility that Mr. Pack may serve as an expert witness, in compliance with the Court's Prehearing Order, Mr. Pack's "Biographical Information" sheet is attached in lieu of C.V. See Exhibit 4.

2. Nicholas Harvanovich. Mr. Harvanovich is a former Director of Facilities of The Okonite Company, now retired. Mr. Harvanovich will testify to certain of the facts stated above in this submission, including but not limited to the training he gave to Mr. Groome when Mr. Groome was hired. In general Mr. Harvanovich may also address to the extent necessary Okonite's use of its Ramsey office building, the function of the utility building, the use of the transformers, and any and all similar or related aspects of the physical and operational characteristics of Okonite's Ramsey location.

Okonite respectfully requests permission from the Court to have Mr. Harvanovich testify at the trial by video conference. Mr. Harvanovich lives in San Luis Obispo, California, and as noted above, is retired as an Okonite employee. In the alternative, if the location selected for the trial does not have a video conference facility, Okonite respectfully requests permission to conduct the *de bene esse* deposition of Mr. Harvanovich, on a date mutually acceptable to Okonite and the EPA counsel, by video conference and memorialized on disc to be presented to the Court at the trial of the matter.

3. James J. Groome. Mr. Groome is employed by Okonite as Director of Safety and Environmental Programs. Mr. Groome will testify to the information recounted above, and in general and to the extent appropriate, to all aspects of Ramsey's environmental programs as they

relate to the Ramsey transformers, any other aspects of Okonite's environmental programs that the Court may deem relevant, and in general with respect to other issues which may be subsumed in the instant litigation between Okonite and the EPA. Mr. Groome will authenticate for purpose of admission into evidence the Community Right to Know reports he has filed in accordance with the law, and furnished to the Ramsey Fire Department. Exhibit 5. These reports reflect notice given to the Ramsey Fire Department annually, starting in 2005, of the presence of PCB transformers at Okonite's Ramsey location, as soon as Mr. Groome learned that the Ramsey transformers contained PCBs.

4. Christian W. Wagner. Mr. Wagner is employed by Okonite as Director of Facilities Engineering at the Ramsey facility. Mr. Wagner has the redundant responsibility, along with Mr. Groome, for the at least monthly inspection of the Ramsey transformers, and may testify to the frequency, nature and method of the inspections, and the procedures to be followed in the event of any perceived difficulty with the transformers. Responsibility for Company procedures with respect to the integrity of the transformers is also redundant as between Mr. Groome and Mr. Wagner.

Respondent reserves the right, and nothing herein is intended or is to be construed to prejudice or waive any such right, to call or not to call any of the aforementioned potential witnesses, and to expand or otherwise modify the scope, extent and/or areas of the testimony of any of the above-named potential witnesses to answer and/or rebut evidence (testimonial or documentary) listed by Complainant in its Prehearing Exchange or on matters arising as a consequence of such evidence.

III. RESPONDENT'S EXHIBITS

Exhibit 1 Okonite's Registration of Ramsey Transformers with EPA on April 5, 2005

Exhibit 2 EPA award to Okonite and James J. Groome

- Exhibit 3 EPA award to Okonite and James J. Groome
Exhibit 4 Biographical Information – Arthur V. Pack, Jr.
Exhibit 5 Ramsey Community Right to Know Reports (2005 - 2010)

IV. TRIAL TIME AND TRIAL LOCATION

Okonite estimates it will need four trial days in the presentation of its case.

Okonite accepts any location selected by the Court for trial of this matter.

V. DISCUSSION OF *IN RE LAZARUS, INC.*, 7 E.A.D. 318 (1997)

Okonite intends to rely on Lazarus and its progeny, in its trial brief, and at trial of this matter.

Accordingly, Okonite submits in this Prehearing Exchange a somewhat more detailed discussion of Lazarus as a supplement to the Preliminary Statement.

The facts in Lazarus relevant to the instant matter were that the respondent operated a department store and annex building served by two PCB transformers. The company had failed to register the transformers with the local fire department by December 1, 1985 as required by the Section 761.30(a)(1)(vi)(A) then in effect. It took a visit from representatives of the EPA on February 13, 1992 to cause Lazarus to rise to the occasion, and one week after the EPA visit, namely on February 20, 1992, Lazarus registered the transformers. 7 E.A.D. 318, at 5, ¶2; *Id.* at 30, ¶1. The EPA inspection found a number of violations (including a leaking transformer). *Id.* at 5, ¶2. In the ensuing complaint proceedings, Lazarus contended that its violation of the registration requirement was fixed and complete as of December 1, 1985, when it failed to meet that suspense date. It contended that therefore, the five-year statute of limitations began to run on that date, and any violation proceeding brought against it by the EPA was thus barred.

The trial Judge rejected Lazarus' contention (7 E.A.D. 318, at 30, ¶2), and the Environmental

Appeals Board affirmed. After a thorough analysis of the issue, the Environmental Appeals Board held unequivocally, that the registration obligation mandated by §761.30(a)(1)(vi)(A) was a continuing obligation. 7 E.A.D. 318, p.3, ¶2. It is entirely clear from the Board's decision in Lazarus that once the obligation to register is met, the violation ceases. As the Board said:

“The requirements to mark the access door and to register PCB transformers with the local fire department are continuing obligations, and thus, an action for penalties based on continuing violations of these requirements is not barred by the statute of limitations.” *Id.* at 4, under “2a & b.”

In language that is directly relevant to the instant matter, the Board first observed:

“The Agency's use of phrases such as ‘continued use’ [FN92] and ‘remaining useful life of PCB Transformers’ [FN93] in the preambles to the transformer fire safety rule is further evidence of the continuing nature of the registration requirement. Because a fire might occur at any time during the useful life of a PCB transformer, it follows that such transformers are subject to the registration requirement on an ongoing basis.” (Emphasis supplied) *Id.* at 32, ¶2.

It then held:

“The use of the date December 1, 1985, in the transformer registration regulation does not limit the applicability of the regulation to a particular time frame. The date is simply an effective date for the registration requirement. This is apparent from the regulatory text which requires that ‘as of’ this date, transformers must ‘be registered.’ The regulation was promulgated some five months prior to December 1, 1985, but EPA did not alter the ongoing nature of the obligation to register transformers. The effective date does not convert the registration obligation into a one-time requirement.” (Emphasis supplied) *Id.* at 32, ¶3.

Finally, the decision in Lazarus viewed as a whole made clear that the respondent's violation continued up until the date it registered the transformers, but that beginning as of the date it did register them, they were no longer in violation of the registration requirement.

Despite the foregoing rulings, the EPA's position in the instant matter had been precisely the same as the position taken by the respondent in Lazarus. As noted in the Preliminary Statement above in this Prehearing Exchange, in filing this Complaint against Okonite, the EPA regarded Okonite's registration of its transformers on April 5, 2005 as a nullity. The EPA gave no effect

whatsoever to the fact of Okonite's registration of its transformers. Indeed, for the EPA's Complaint against Okonite to have been valid, this Court would have had to construe the registration requirement of §761.30(a) to be a "one-time requirement," to be missed at one's complete peril of losing the use of PCB transformers for their remaining life, with no cure of the violation possible.

All the policy reasons expressed in Lazarus establish why it is even in the EPA's interest, and hence in the society at large's interest, that the EPA's former construction of the registration requirement not be accepted. These policy reasons will be addressed at length in Okonite's full trial brief to be submitted to the Court. One such reason, briefly adverted to here, is of course the policy which is manifest from a comprehensive view of the entire regulatory scheme for PCB transformers, that where they exist, how they are used, the condition they are in and whether they are inspected, must become subject to EPA scrutiny. That scrutiny is best achieved if the EPA knows that they exist. If a PCB transformer user has missed the registration date, it is nevertheless in the society's interest that the transformers be registered, as opposed to the user allowing them to remain undisclosed, so that the transformers become subject to EPA inspection and regulatory enforcement where appropriate.

Query why the EPA would entertain the contrary position, which if anything is conducive to unregistered PCB transformers remaining in that status, thus denying the society at large knowledge of them, and the ability of the EPA to enforce the regulatory scheme to the end of the transformers' useful lives.

Okonite refers above to progeny of the Lazarus decision. These will be treated at length in Okonite's trial brief. However, passing reference to certain cases which have cited Lazarus demonstrate the consistency and adherence of the Environmental Appeals Board to the principle of

continuing obligation it articulated in Lazarus.

The case of In re: Mayes, 2005 EPA App. *LEXIS 5*, March 3, 2005, held:

“ * * * Both the notification and the registration requirements are conditions precedent to the use or continued use of items (i.e., USTs containing regulated substances, PCB transformers) Congress had determined warranted comprehensive governmental regulation because of the hazards their unregulated use otherwise poses to human health and the environment. In both instances, Congress and/or EPA established specific deadlines by which parties must notify/register, and, as we found in *Lazarus*, we also find here that the obligation to notify/register necessarily continues beyond the deadline if the deadline is not met. * * * ” (Citation omitted.) 2005 EPA App. *LEXIS 5*, at 46-47.

In re: Newell Recycling Company, Inc., 1999 EPA App. *LEXIS 28*; 8 *E.A.D.* 598, did not involve registration of PCB transformers. However, it did involve an enforcement proceeding under TSCA and did involve a different portion of the PCB regulation. The dispositive issue was the same as in Lazarus, namely whether the regulation imposed a continuing obligation on the PCB user to comply with the regulation, as opposed to simply imposing a one time fixed and final obligation.

The Environmental Appeals Board held in relevant part:

“Viewed as an obligation, the regulation on its face carries no temporal limitation. It does not as we expressed the idea in *Lazarus*, prescribe a ‘requirement [] that must be fulfilled within a particular time frame.’ On the contrary, nothing in the regulation remotely suggests that the obligation described is discharged or extinguished simply with the passage of time. Instead, the obligation is discharged only with the occurrence of a specified event – the proper disposal of PCB contaminated soil at an incinerator or a chemical waste landfill. Until this occurs, compliance with the regulatory mandate has not been achieved. * * * ” 1999 EPA App. *LEXIS 28*, at 42.

The converse of this language clearly is that when the continuing obligation is fulfilled, then the violation ceases.

Okonite will ultimately submit to the Court in its trial brief and at trial, that under the Lazarus and progeny body of law, the EPA Complaint in the instant matter is not substantially justified. In re: H.E.L.P.E.R. Inc., 1999 EPA App. *LEXIS 19*, 45; 8 *E.A.D.* 437.

VI STATEMENT REGARDING THE PROPOSED PENALTY

A.

In its Prehearing Exchange the EPA reiterates the contents of its Complaint, and then indicates that it seeks a penalty only for one day of violation, namely, May 7, 2009, the date of the EPA inspection. EPA Prehearing Exchange, p.11, ¶2. As of May 7, 2009, the transformers in question had been registered with the EPA for more than four years. Therefore, beginning as of April 5, 2005 Okonite's transformers were in compliance with §761.30(a), and thus were in compliance with TSCA. *A fortiori*, as of the date on which the instant Complaint is premised, namely, May 7, 2009, Okonite's transformers were in compliance with §761.30(a) and thus were in compliance with TSCA. There was thus no violation on May 7, 2009, and therefore no basis whatsoever for Okonite to be fined. The EPA Complaint fails to state a claim upon which relief can be granted.

B.

In the alternative to the argument in "A" above, but only in the alternative, Okonite reserves the right to contest on the merits the claims and positions otherwise taken in the EPA discussion in its Prehearing Exchange under the heading "VI. Statement Regarding the Calculation of the Penalty." Okonite submits that various of the positions taken are inconsistent with the decided cases, and are inconsistent with, and in fact violative of the EPA's own policies with respect to penalties, and inconsistent and violative of applicable statutes. Okonite will detail its contentions in this respect in its trial brief, or in a supplement to this Prehearing Exchange if the EPA elects to continue prosecution of its Complaint.

C.

1.

Okonite asserts no claim of inability to pay or inability to continue in business.

2.

Okonite has communicated to the EPA, and reiterates here, that its competitors in the portion of the wire and cable market that Okonite participates in, are by and large corporations many times Okonite's size, and most of which are ultimately foreign owned. It is the dominant fact of life of Okonite's business that because it has no parent or affiliates upon which it can rely in adverse economic times such as those that afflict the United States presently, Okonite's ability to continue to succeed is a function in large part of its ability to control its costs. Similarly, Okonite is a domestic corporation, and operates out of the belief that as such it will not, and in fact does not, outsource any of its operations, relying instead and entirely only upon its factories located in the United States, and on workers located exclusively in the United States.

The Court can take judicial notice of the straitened economic conditions which currently beset the Country. Okonite has conducted its operations with a purpose not to lay off any of its employees/owners if that is at all humanly possible. As one means of achieving that goal, it is again essential that Okonite control costs in every way and at every turn. Part of that cost control is effective stewardship of its environmental obligations, so that it does not incur fines, and does not incur the expense inherent in and the diversion of its energies in defending enforcement actions. In the instant matter Okonite should not be incurring the expense of enforcement, certainly should not pay a fine, and certainly because it has seen to it that its transformers are in every way exemplary in their compliance with the applicable regulations, should not be compelled to undergo the expense

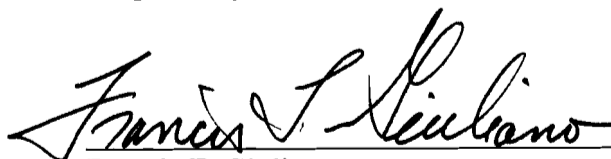
of removing its existing transformers from service, plus the expense of replacing them, before their time. Okonite accepts unequivocally the ultimate goal of TSCA, and the implementing regulations, that PCB transformers will one day no longer be used. When the transformers in question have reached the end of their useful lives Okonite will replace them, of course with non-PCB-containing transformers. There is no reason why Okonite should incur the cost of doing so prematurely. Thus while there is no issue of Okonite continuing in business, nevertheless deferring the costs of replacing the existing transformers through the end of their useful lives assists Okonite in achieving its goal of carefully husbanding its resources so that it can maintain full employment in the face of the extraordinary competitive pressures with which it must contend in general, and in the face of the adverse economic times which currently exist. Okonite has expressed these facts and circumstances of Okonite's corporate existence to the EPA, but as the filing and continued prosecution of the instant enforcement action reveal, to no avail.

VII. PAPERWORK REDUCTION ACT

Okonite asserts no defense under the Paperwork Reduction Act.

Dated: August 6, 2010.

Respectfully submitted,



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