

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

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In the Matter of	:	
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Oakite Products, Inc., d/b/a	:	Docket Number:
Chemetall Oakite,	:	<u>TSCA-02-2009-9148</u>
and Chemetall US, Inc.,	:	
	:	
Respondents.	:	Hon. Barbara A. Gunning,
	:	Presiding Officer
Proceeding under Section 16(a) of	:	
Toxic Substances Control Act,	:	
15 U.S.C. § 2615(a).	:	
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U.S. ENVIRONMENTAL
PROTECTION AGENCY-REGION 2
2010 MAR 19 PM 2:47
REGIONAL HEARING
CLERK

MOTION FOR ADDITIONAL TIME FOR FILING PREHEARING EXCHANGE

Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, EPA, Region 2 (EPA), through her attorney, hereby makes this request for this Court to grant an additional extension of time for the parties to file their prehearing exchanges, an extension concurred in by Respondent. While the order granting the prior extension, dated December 16, 2009, noted that “no further extensions will be granted absent extraordinary circumstances,” Complainant submits that the circumstances outlined below are sufficient for an additional extension of time, if not for two months then for six weeks.

As noted in the prior motion (which also served as a status report following the parties’ settlement conference), this administrative proceeding under Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. § 2615(a) seeks a substantial civil penalty of \$438,400 for alleged violations occurring at Respondents’ facilities in La Mirada, California, and Romulus,

Michigan; the complaint alleges Respondent failed timely to comply with the requirements pertaining to the TSCA Master Inventory update reporting provisions, 40 C.F.R. § 710.53. The parties held a settlement conference in December 2009.

As part of the settlement conference, the parties discussed the possibility of Respondents undertaking a Supplemental Environmental Project (SEP). In January of this year, as well as the following month, Respondents provided information to EPA on the proposed SEPs. These were, as previously noted, “innovative and potentially promising [SEPs].” The proposed SEPs involved the acquisition, installation and operation of equipment designed to provide various structural safeguards against the release of hazardous and toxic materials into the environment. EPA, at both the regional level and at headquarters, then reviewed and analyzed the proposals, a necessarily time-consuming project given the extent of technical details and the requirements of the Agency’s SEP policies, not least of which involves an analysis whether the proposals comport with and meet the requisite criteria of the nexus requirement.¹ After extensive intra-agency communication between regional and headquarters officials, Complainant contacted

¹ The SEP policy states the following (page 5) (document available at <http://www.epa.gov/compliance/resources/policies/civil/seps/fnl-sup-hermn-mem.pdf>):

All [SEPs]...must have an adequate nexus. Nexus is the relationship between the violation and the proposed project. This relationship exists only if:

- a. the project is designed to reduce the likelihood that similar violations will occur in the future; or
- b. the project reduces the adverse impact to public health or the environment to which the violation at issue contributes; or
- c. the project reduces the overall risk to public health or the environment potentially affected by the violation at issue.

Respondents earlier this month to seek additional and clarifying information. This has recently been provided and this information is now being evaluated.

Given the complexity of the proposed SEPs and the concomitant time required for EPA to give it due consideration, Complainant respectfully requests this Court to exercise its supervisory discretion over this proceeding and accordingly extend for one more (and last) time the schedule for the parties to engage in prehearing exchange. Had the undersigned realized the process would have taken this long, then the December motion would have requested more than the two-months therein sought. As Respondents' counsel joined the request in the December motion, so too does he now. This request is in keeping with EPA policy that "[t]he Agency encourages settlement of a proceeding at any time...."² Moreover, the Agency's SEP policy acknowledges that an SEP may be an appropriate part of a settlement if it "further[s] EPA's goals to protect and enhance public health and the environment."³

Thus the present request for an extension is being made to allow for the full exploration of the possibility of potentially promising SEPs to be implemented as part of the settlement of this case. To the extent the initial extension of time requested was insufficient, the undersigned apologizes to this Court for having failed to recognize more accurately the extent of the time needed.

² 40 C.F.R. § 22.18(b)(1).

³ First page of the policy, available at <http://www.epa.gov/compliance/resources/policies/civil/seps/fnl-sup-hermn-mem.pdf>. This is buttressed by the January 1999 EPA document entitled, "EPA's Supplemental Environmental Projects Policy: Questions and Answers for the Practitioner," where it states that "EPA's SEP Policy encourages the use of environmentally beneficial projects as part of the settlement of an

As previously stated, it is the intent and desire of the parties to this proceeding to comprehensively pursue this avenue of settlement possibility, and they wish to do so without the need to concern themselves with litigation deadlines; at this stage of the proceeding, they wish to focus their efforts and attention on these potential SEPs and not on fast-approaching litigation imperatives. The parties recognize, however, that there is a limit to how much time they can have to explore settlement, and, therefore, seek no more than this one additional extension in order to have this additional time to ascertain whether the proposed SEPs would be appropriate.

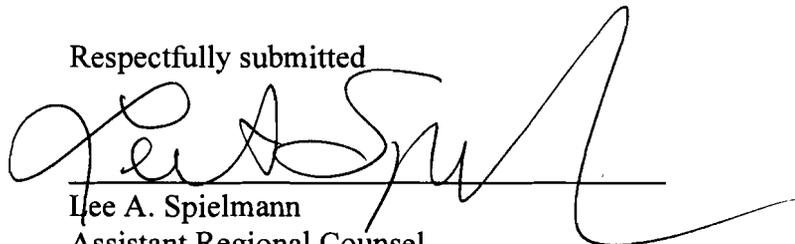
Complainant submits that the circumstances demonstrate that the good cause requirement of 40 C.F.R. § 22.7(b) exists for the granting of this motion. These particular reasons are amplified because of additional factors: neither party has filed any dispositive motion and no hearing date has been set. Neither party will be prejudiced by this additional extension that both agree would be beneficial to settlement discussions. In short, the parties are seeking an additional opportunity to see if Respondents' proposed SEPs are acceptable to EPA, and, in doing so, only request no more than two months. Under these circumstances, this request should be deemed both reasonable and meeting the "extraordinary circumstances" threshold established by this Court's December order.

Therefore, EPA respectfully moves this Court, pursuant to 40 C.F.R. §§ 22.4(c)(2), 22.7(b), 22.16(a) and 22.19(a), for an order: **a)** vacating so much of the December 16, 2009 order mandating the parties to serve their prehearing exchanges by the dates therein set forth, and **b)** extending the deadline for each submission set forth in said order by a period of two months, *i.e.* EPA would be required to file its initial prehearing exchange by May 28, 2010, Respondents would be required to file their prehearing exchange by June 11th, and any rebuttal by EPA would

have to be filed by June 25th, or, c) as an alternative to “b,” for the parties to serve their respective prehearing exchanges as follows — EPA’s initial one by April 19th, Respondents’ by May 3rd, and EPA’s rebuttal by May 17th.

Dated: March 18, 2010
New York, New York

Respectfully submitted

A handwritten signature in black ink, appearing to read "Lee A. Spielmann", written over a horizontal line.

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In re Oakite Products, Inc. et al.
Docket No. TSCA-02-2009-9148

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing "MOTION FOR ADDITIONAL TIME FOR FILING PREHEARING EXCHANGE," dated March 18, 2010, in the following manner to the respective addressees listed below:

Original and One Copy
By Inter-Office Mail:

Office of Regional Hearing Clerk
U.S. Environmental Protection
Agency - Region 2
290 Broadway, 16th floor
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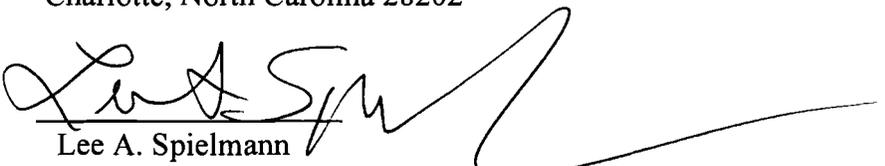
Copy by Fax Transmission,
202-565-0044, and
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Honorable Barbara A. Gunning
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Dated: March 18, 2010
New York, New York


Lee A. Spielmann