UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2

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

BRIEF ON BEHALF OF THE OKONITE COMPANY, INC.
PURSUANT TO THE COURT'S DIRECTIVE SET FORTH IN THE ORDER
SCHEDULING ORAL ARGUMENT DATED SEPTEMBER 8, 2010

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PROCEDURAL HISTORY

The Court's Order Scheduling Oral Argument directed the parties to file briefs on the issue of whether failure to register a PCB Transformer by December 28, 1998, pursuant to 40 C.F.R. §761.30(a)(1)(vi)(A), precludes subsequent registration and authorized use of the PCB Transformer. This brief is submitted in compliance with the Court's directive.

PRELIMINARY STATEMENT WITH RESPECT TO THE STATUTE OF LIMITATIONS

The Complaint in this matter invokes the jurisdiction of the Court, and seeks an adjudication, with respect to one day, and only one day, namely, May 7, 2009. Complainant seeks to establish that Okonite committed the violation of unauthorized use of a PCB transformer on that one day only. No other dates, and no other time periods, are before the Court for adjudication.

Viewed from that narrow and precise standpoint, the Complaint is not barred by the 28 U.S.C. §2462 five-year statute of limitations. Okonite registered the transformers in question on April 5, 2005. The Complaint was filed on February 24, 2010. ORDER SCHEDULING ORAL ARGUMENT, p.1, ¶1. Thus viewed in isolation from the Complainant's legal position in this case, the Complaint was timely.

Okonite relies on In Re Lazarus, 7 E.A.D. 318 (1997), which held that the regulatory obligation to register a PCB transformer is a continuing obligation, and that once registered, any violation ceases. The necessary consequence of Okonite's reliance on the doctrine of continuing

obligation is that the statute of limitations did not begin to run until Okonite registered the transformers on April 5, 2005. Thus the statute of limitations would not have expired until April 5, 2010, and the Complaint was thus timely by just over a month.

However, the Complainant has now made clear that it seeks to overturn the decision of the Environmental Appeals Board in Lazarus. In the instant matter the Complainant adopts the exact same legal position that the violators in Lazarus, and in Standard Forgings Corporation and Trinity Industries, 1997 WL 273143 (EPA), adopted in an effort to evade their environmental responsibilities. The violators in both cases contended that their respective failures to register PCB transformers were violations complete and incurable, as of the day of the failure to register. Both violators contended that the statute of limitations therefore began to run on the date of the failure. The violators' arguments proceeded to their logical conclusion, which was, that any enforcement action being barred, five years later they were free from further consequence or sanction.

In the instant matter, the EPA advocates for precisely the position adopted by the violators in Lazarus and Standard Forgings, the very position the EPA opposed in those cases. The necessary consequence of the EPA's position in the instant matter therefore is that if in fact Okonite's failure to register on December 28, 1998 was complete, and could not be cured by late but voluntary registration, then the five-year statute of limitations began to run on December 28, 1998, and thus had long expired by the time the instant Complaint was filed in 2010.

Okonite thus raises the statute of limitations defense only conditionally, that is, only if this Court were to become persuaded that the construction of the registration regulation sought by the Complainant in this case is the correct legal meaning to be given to the regulation. In that event, and only in that event, Okonite submits that the instant Complaint is barred by the statute of limitations,

and therefore should be dismissed.

Such an outcome would leave Okonite obligated to continue to comply with the entirety of the PCB transformer regulatory scheme. The undisputed facts before the Court reflect that in fact Okonite was in such total compliance on May 9, 2009, the date of the EPA inspection. As indicated in its Pre-Hearing Exchange, Okonite acknowledges without qualification its obligations to comply with every aspect of the regulations governing its use of the two PCB transformers at its headquarters, to the end of their useful lives.

Okonite's preferred disposition of the instant matter is not by virtue of the statute of limitations however. To the contrary, Okonite believes that the regulation imposing the registration requirement created a continuing obligation, and seeks an adjudication that upon discovery of its error, Okonite forthwith registered its transformers and came into compliance with the law.

Concerned as much as any other citizen exposed to the potential deleterious effects of unregulated PCB transformers, Okonite submits that the Complainant's position in this case is wrong from the standpoint of protecting the environment and the populace, is wrong from a legal standpoint, and is wrong as a vitiation of the underlying purposes of the registration requirement in the first place. Okonite seeks to persuade the Court of the validity of these positions in this brief, and only in the alternative, in the event Okonite fails to so persuade the Court, does Okonite rely on the five-year statute of limitations as a complete bar to the maintenance of the Complaint *sub judice*.

POINT I

THE PCB TRANSFORMER REGISTRATION REQUIREMENT OF 40 C.F.R. §761.30(a)(1)(vi)(A) ESTABLISHES A CON-TINUING OBLIGATION TO REGISTER, AND DOES NOT PRECLUDE REGISTRATION AND AUTHORIZED USE OF PCB TRANSFORMERS SUBSEQUENT TO DECEMBER 28, 1998.

Okonite discussed the facts of In Re Lazarus, 1997 WL 603254, 7 E.A.D. 318, in its Prehearing Exchange. Respondent's Prehearing Exchange at 12, ¶4. To avoid unduly extending the length of the instant brief, Okonite respectfully incorporates that discussion by reference here.

The trial court in its decision of the Lazarus matter ruled that the then existing PCB transformer registration requirement, which mandated registration with the local fire department by December 1, 1985, established a continuing obligation to register, even after the December 1, 1985 prescribed date. Appeal was taken to the Environmental Appeals Board, and in affirming the judgment of the trial court holding that registration was a continuing obligation, the Board undertook a comprehensive review of the relevant TSCA statutory underpinnings of the EPA's enforcement action against the Lazarus company, and of the text, the history and purpose of the regulation mandating registration.

That analysis is directly relevant to, and Okonite submits, is controlling in the instant matter. The EAB rejected Lazarus' contentions that the registration requirement for December 1, 1985 was fixed, final and immutable, and therefore triggered the running of the statute of limitations on the date of violation. In so doing the Board first held that a review of TSCA revealed the Congressional intent to permanently ban PCB uses, indefinitely into the future, except as specifically permitted under rules to be known as "use authorizations." 7 E.A.D. 318, at 30, ¶4-31, ¶1. The Board held that when the broad permanent ban on PCB use was combined with exceptions in the form of

specific use authorizations, then for the permanent ban to be effective the predicate conditions to the use authorizations had to be continuing obligations. *Id.* at 31, ¶1 and ¶3.

Next the Board considered indicia of the continuing nature of the registration obligation in the preambles to the final regulation. The Board quoted the EPA's determination "that * * * adding conditions and restrictions on the use of the remaining PCB Transformers (including * * * registration, and labeling) will significantly reduce the fire-related risks posed by the use of PCB Transformers." *Id.* at 3, ¶1. It then reviewed specific benefits the EPA anticipated from the rule, such as enhanced use by firefighters of protective equipment, enhanced safety of bystanders and onlookers and contact information for the transformer owner/employee who would respond to a transformer fire. *Id.* at 32, ¶2. The Board then concluded:

> "* * * In order to maintain the utility of the registration, it is reasonable to expect that changes in such information after the initial act of registration must be relayed to the appropriate fire response organization." *Ibid.*

This conclusion implicitly reflects another indicium of the continuing nature of the registration obligation, in the Board's expectation that information previously furnished the fire department would have to be updated on a continuing basis as changes in the underlying circumstances might dictate.

The Board in Lazarus found still additional evidence of the continuing nature of the registration obligation in the "Agency's use of phrases such as 'continued use' and 'remaining useful life of PCB Transformers' in the preambles to the * * * " regulation. As the Board said:

> " * * * 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." *Ibid.*

With respect to the fixing of the registration date as December 1, 1985, the Board said:

> "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 provided facilities time to comply with the new requirement. In so doing, 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." *Id.* at 32, ¶4.

On the basis of the foregoing analysis, the Board held that the requirement to register PCB transformers was a continuing obligation. 7 E.A.D. 318, at 32, ¶5. Thus it rejected in its entirety Lazarus' contention that the failure to register was fixed and final on the day of the failure to register, held instead that the violation continued until it was abated by registration, and that the statute of limitations could not have begun to run until the violation was abated.

The most directly relevant and controlling portion of the Lazarus decision for purposes of the instant matter is its holding that the obligation to register is continuing. When Okonite voluntarily registered its PCB transformers on April 5, 2005, its violation of the regulation ceased. Okonite appreciates the reasonableness of the EPA decision not to seek any penalty against Okonite for any period prior to April 5, 2005, and appreciates further that EPA has allowed the statute of limitations to run as against any such violation. Okonite presumes this election on the part of the EPA is attributable to the fact that on its inspection on May 7, 2009, the EPA representatives found Okonite's compliance with all the regulatory mandates for the safe operation of PCB transformers to be exemplary. Respondent's Prehearing Exchange, p.2, ¶2.

In attempting to prevail on its assertion that Okonite's transformers were illegal on and as of the May 2009 inspection, EPA adopts the same legal position that the Lazarus company adopted in attempting to defeat the EPA complaint against it. Thus in the instant matter EPA is adopting a

legal position directly opposite to the position it took in opposing Lazarus' attempt to hide behind the technicality of a "fixed and immutable" violation, followed by a fortuitous "running" of the statute of limitations. EPA was right then to oppose the construction of the regulation Lazarus sought, and the Environmental Appeals Board ruled that the EPA was right in its opposition to Lazarus' defense.

Now however in its prosecution of the instant matter against Okonite, the EPA for whatever purpose comes before this Court relying on the contention that because of a minor textual change when 40 C.F.R. §761.30(a)(1)(vi)(A) was amended in June of 1998 to require registration with the EPA instead of local fire departments, Lazarus would be decided differently today by the Environmental Appeals Board than the way it was decided before the rule was amended. Merely stating this proposition would seem to be its own refutation. Had Lazarus prevailed in its contention, an injustice would have been done. It was clear from the entirety of the facts, including Lazarus' other violations that accompanied the failure to register, that Lazarus at best was indifferent to its obligations under the PCB regulations. Had the EPA taken the position then that it takes against Okonite today, Lazarus' indifference toward its PCB transformer mandates would have been rewarded. It is indeed difficult for Okonite to believe that the Environmental Appeals Board would decide Lazarus differently today, were the same contention to come before it on the basis of the wording of the present registration rule. But it is precisely such a decision that this Court is being asked to render by the EPA in the instant matter, given the EPA's contention that under the present regulation Okonite's failure to register was fixed and incurable, and that even though it did register, the registration was a nullity.

It appears from the Complainant's Rebuttal to Respondent's Prehearing Exchange, that the

EPA's legal position stems from and depends entirely on the replacement of "as of" in the former regulation with "no later than" in the present regulation. The Complainant did not cite any authority for investing this relatively minor language change with such great significance. Moreover, Okonite's own legal research has not located any case which ascribes such portentous consequences to this language change, or which signifies that the EPA intended to overrule the Lazarus decision by making the language change.

In addition, the preambles to the promulgation of the final rule on June 29, 1998, and the EPA's comments to the various questions and positions raised by the commenters to the proposed rule, contain no such reference to any intent on the part of the EPA to overrule Lazarus, or to invalidate the methodology undertaken in Lazarus for determining when and whether an obligation under an applicable regulation is a continuing obligation. Exhibit 2. Indeed, a point by point comparison of the factors the Environmental Appeals Board used in its analysis in Lazarus, with the statements of the EPA in the preambles to the June 29, 1998 final rule, reveals that the same underlying objectives of the registration requirement the Environmental Appeals Board found in Lazarus, continued to exist, and continued to motivate the EPA in the 1998 regulation. Okonite undertakes that point by point comparison in Point III of this brief.

In addition to citing no case authority for its contention that the change from "as of" to "no later than" overturned Lazarus and the other decisions of the Environmental Appeals Board referenced in the next point in this brief, the EPA fails to explain, at least to this point in time why the very doctrine on which it relied when it prevailed in Lazarus (and in the other cases Okonite references in Point II), no longer serves to protect the society and the environment from the danger of unregulated PCB transformer use. Okonite addresses the legislative history of 40 C.F.R.

§761.30(a)(1)(vi)(A) in Point III of this brief, and seeks to establish there that the same protections the EPA brought about when it adopted the PCB transformer registration rule in 1985 continued to inhere in EPA's adoption of the registration requirement in 1998. That protection included the judicial construction placed on the regulation to the effect that it created a continuing obligation to register, beyond the particular date stated in it.

In its Rebuttal Prehearing Exchange, the Complainant seeks to distinguish Lazarus asserting that the issue in Lazarus was "failure to register PCB transformers with the local fire department." Complainant Rebuttal Prehearing Exchange, p.4, ¶3. It urged on the Court that the distinction arose from the fact that the Complaint in the instant matter alleges "unauthorized use of PCB transformers" as opposed to "failure to register." *Ibid.* But this is a distinction without a difference. The only basis in the instant matter for the accusation that Okonite's transformers were unauthorized for use, is the contention that Okonite failed to register its PCB transformers with the EPA. The issue in Lazarus arose because of late registration of the respondent's transformers and the issue in the instant matter arose because of late registration of the Respondent's transformers. Okonite respectfully submits that the purported distinction between Lazarus and the instant matter purveyed in the Complainant's Rebuttal Prehearing Exchange is patently invalid. Therefore, the holdings and analyses in Lazarus govern in the instant matter, and that under those holdings and analyses, Okonite's late registration was valid as in compliance with its continuing obligation to register. Therefore, its use of the transformers in question was authorized from and after the date of its registration, namely, April 5, 2005.

In City of Salisbury, 2002 EPA App. 6 (January 16, 2002), the Environmental Appeals Board held, in relevant part, that the "complainant retains the ultimate burden of persuasion that the

violations occurred as alleged in the complaint. Citations omitted." *Id.* at 51, ¶3. Okonite agrees with the Court's observations in the instant matter in its Order Scheduling Oral Argument that the facts before the Court are not in dispute, and that indeed the issue in this case is a question of law. Okonite submits on the basis of the above discussion of Lazarus, and on the basis of its arguments in the ensuing Points in this brief, that the Complainant has not carried and cannot carry its ultimate burden of persuasion, and accordingly, Okonite will request at the conclusion of this brief that the Complaint against it be dismissed.

POINT II

DECISIONS OF THE ADMINISTRATOR AND OF THE ENVIRONMENTAL APPEALS BOARD SUBSEQUENT TO THE DECISION IN LAZARUS, *SUPRA*, REFUTE THE COMPLAINANT'S CONTENTION IN THE INSTANT MATTER THAT THE EPA OVERRULED LAZARUS WHEN IT ADOPTED THE REQUIREMENT TO REGISTER PCB TRANSFORMERS WITH THE EPA.

In the case of Bunker Hill Mining Company and Mining Corporation of Idaho, 1996 WL 691519 (EPA), the EPA took the position that registration of PCB transformers subsequent to the due date was both appropriate and legal. That position is reflected in the following quotation from the decision in Bunker Hill:

> "Inasmuch as Respondent MCI admitted, and the parties have stipulated, that PCB transformers at the facility were not registered with fire response personnel having primary jurisdiction for responding to a fire at Respondents' facility, it is determined that 40 C.F.R. §761.30(a)(1)(vi) was violated as charged, although they were properly registered within six weeks of Respondents' being informed of the violation." Emphasis supplied. 1996 WL 691519 (EPA) at 5, ¶6.

Thus similar to the position the EPA took in the Lazarus case, it stipulated in Bunker Hill that respondents' late registration of PCB transformers was both permissible and legally effective.

The case of The Matter of Standard Forgings Corporation and Trinity Industries, 1997 WL 273143 (EPA) March 20, 1997, was decided after the trial level decision in Lazarus, and just a few months before the Environmental Appeals Board decision in Lazarus. The Standard Forgings case involved admitted failure to register PCB transformers by December 1, 1985. In fact, the EPA conducted an inspection on June 20, 1991, and as of then the PCB transformers had not been registered. Just as did the violator in Lazarus, Standard Forgings contended that its obligation to register on December 1, 1985 was absolute, that its failure on that date was complete and fixed and therefore the statute of limitations began to run on any enforcement action. The EPA's response to

this contention was that "while the violation began on December 1, 1985, it continued until respondent registered the transformers." *Id.* at 3, ¶4. In support of its position the EPA relied on the trial level decision in Lazarus, specifically contending that the registration requirement was a continuing obligation. The EPA prevailed on this contention, the Court ruling in relevant part that the reality that although PCB transformers may not be registered, they continue to be used, and that fact creates "a continuing risk to human safety and health as long as there is non-compliance." *Id.* at 4, ¶1. Thus in Standard Forgings the EPA advanced the same contention Okonite is advancing here, namely that Lazarus established a continuing obligation to register PCB transformers, which was fulfilled when the transformers were registered. It is clear then from the holding in Standard Forgings that when the transformers in that case were ultimately registered the act of doing so was effective to terminate the violation.

The EPA contends in the instant matter that after June 29, 1998, when the final PCB rule was promulgated (Exhibit 2), the Lazarus decision was no longer the law. The case of Newell Recycling Company, Inc., 1999 (EPA App.) LEXIS 28; 8 EAD 598 (September 13, 1999), provided another setting in which the Environmental Appeals Board considered a statute of limitations defense based on an obligation purportedly becoming fixed and immutable, and in which the EPA had the opportunity to address the viability of the analysis the Board undertook in Lazarus. The Newell case was an enforcement action under TSCA, the respondent having violated PCB disposal requirements set forth in 40 C.F.R. § 761.60(a)(4). 8 EAD 598, 93, 1, ¶1. The operative fact appears to have been that Newell excavated PCB-contaminated soil in 1985, placed it in a pile at the facility which was the subject of the enforcement action, and allowed it to remain there with no further effort at proper disposal for more than 10 years.

Newell contended that any enforcement action against it for improper disposal was barred by the five-year statute of limitations, 28 U.S.C. §2462. *Id.*; ¶3. Just as did Lazarus, Newell contended that from the time it created the soil pile, it was responsible for proper disposal and its failure to do so began the running of the statute of limitations. In undertaking an analysis of this defense the Environmental Appeals Board resorted to both the methodology it had pursued in Lazarus, and to the outcome in Lazarus. *Inter alia*, it quoted from Lazarus to the following effect:

> " ' * * * Under the special accrual rule, the limitations period for continuing violations does not begin to run until an illegal course of conduct is complete. Thus, if the doctrine of continuing violations applies * * * , an action for civil penalties may be initiated during a period of continuing violations and up to five years after the violations have ceased.' In re Lazarus, Inc. TSCA Appeal No. 95-2, slip. op. at 63 (EAB [*37] September 7, 1997), 7 E.A.D." 1999 EPA App. LEXIS 28; 8 E.A.D. 598, at 103, ¶s 3,4.

The relevance of this quote for the viability of the Lazarus decision beyond the June 29, 1998 amendment of the registration regulation is the explicit reliance on the Lazarus holding that where there is a continuing obligation there is also the opportunity to remedy the violation, by complying with the underlying regulatory requirement. In short, Newell held, in relevant part, that a continuing violation becomes complete when the violation is ended.

The EPA claims in the instant matter that under the amended regulation it was not possible for Okonite to end the violation by registering the transformers as it did. If that were the effect of the amended regulation, then the Environmental Appeals Board should not have cited Lazarus in rejecting Newell's theory that its violation was complete and incurable as of the date it began. Yet the Newell decision contains no argument from the EPA against the continued viability of Lazarus, and certainly the Environmental Appeals Board holding was rendered without any hint that the authority of the Lazarus decision might have been called into question by the replacement of "as of"

with "no later than" in 40 C.F.R. §761.30(a)(1)(vi)(A).

In the Newell case, the Environmental Appeals Board also relied on the decision in In re Harmon Industries Inc., RCRA (3008) Appeal No. 94-4, slip. op. at 50 n.41 (EAB, March 24, 1997) 7 E.A.D. Newell, 1999 EPA App. LEXIS 28, at 103. In so relying, the Board made it a point to state in a footnote that Harmon was reversed on other grounds unrelated to the statute of limitations issue, and made it a further point to note that the Harmon decision was then under challenge in the Eighth Circuit Court of Appeals. 8 E.A.D. 598, p.103. The EPA contends before this Court that Lazarus had been substantially modified in 1998, by the adoption of the amended regulation, yet the Environmental Appeals Board while discussing the potential impairment of Harmon as a basis for its holding, nevertheless made no suggestion in Newell that Lazarus had been impaired by the amendment in June, 1998. It is submitted therefore that in fact in Newell neither the EPA nor the Environmental Appeals Board took any such view of the amended 40 C.F.R. §761.30(a)(1)(vi)(A) as is now being espoused by the EPA in the instant action some 10 years after the decision in Newell.

Moreover, the Environmental Appeals Board in Newell made specific reference to the viability of the methodology undertaken in Lazarus for deciding the issue of whether the PCB registration rule contemplated a continuing obligation, or whether it established a fixed and immutable violation. The Board in Newell validated the Lazarus methodology when it said:

> "We begin by examining the statutory enactment underlying the regulation allegedly * * * violated. In the TSCA context, the Board has previously undertaken such an examination in the *Lazarus* proceeding." *Ibid.*

The Board in Newell then undertook the same step by step analysis that it did in Lazarus, first considering § 6(e) and § 16(a)(1) of TSCA, and then just as it did in Lazarus addressing the impact of those sections on the question of continuing obligation. *Ibid.*

After concluding that section 16(a)(1) was capable of supporting the doctrine of continuing obligations, the Environmental Appeals Board in Newell went on to consider the regulation itself. In so doing, it again quoted from Lazarus to the following effect:

> "'words and phrases connoting continuity and descriptions of activities that are typically ongoing are indications of a continuing nature * * * [whereas] a continuing nature may be negated by requirements that must be fulfilled within a particular time frame' Id. at 66 (Footnotes omitted)" 8 EAD 598 at 104, ¶1.

The Board then continued its reliance on Lazarus, literally. It said, in relevant part:

> "*Lazarus* demonstrates that, within the confines of the TSCA PCB regulations, certain regulatory provisions exhibit indicia of 'continuity' whereas others implicate a 'particular time frame' leading to divergent applications of the * * * limitations bar. See *Id.* at 73 (Obligation to register PCB Transformer with local fire response personnel held continuing in nature; *id.* at 78 (Obligation to mark transformer room access door with a prescribed symbol held continuing in nature); *id.* at 82-83. * * *"

If the June 29, 1998 amendment of the registration regulation had impaired the authority of Lazarus in any way, it is exceedingly doubtful that the Environmental Appeals Board would have literally quoted, and relied explicitly on the Lazarus holdings that the registration requirement was a continuing obligation, and that the access marking requirement was a continuing obligation. Therefore, Okonite respectfully submits that the existence of the Newell decision, rendered as it was after the registration regulation was amended in 1998, contradicts the EPA's present position, and represents a validation of the holdings in Lazarus and the applicability of them to the doctrine of continuing obligations.

The case of In re: Norman C. Mayes, 2005 EPA App. LEXIS 5 (March 3, 2005), is another decision of the Environmental Appeals Board which evidences strongly that despite the amendment of 40 C.F.R. 761.30(a)(1)(vi)(A), both the analytical framework of Lazarus and the holdings of Lazarus remain the law on the issue of continuing obligations. Although the Mayes case dealt with

a RCRA issue, the Board rendered an extensive discussion which as a practical matter equated the PCB regulations before the Court in the instant matter, with the RCRA concern the Board was addressing in the Mayes case, and established beyond any cavil the equivalence of those two sections from the standpoint of the viability of the continuing obligations doctrine articulated in Lazarus.

Mayes had failed to register underground storage tanks and to equip underground storage tanks with release detection mechanisms. In affirming the trial court's judgment against Mayes, the Environmental Appeals Board opinion was replete with references to and reliance upon Lazarus. As the Board did in its opinion in Newell, it reiterated that it had established an analytical framework for determining whether regulatory obligations were continuing in nature and then briefly described the framework. 2005 EPA App. LEXIS 5, at p.8, ¶3. Noting that the analytical framework required discerning the intent and purpose of the regulatory requirements, the Board quoted from Lazarus:

> " * * * 'Words and phrases connoting continuity and descriptions of activities that are typically ongoing are indications of a continuing nature. In contrast, a continuing nature may be negated by requirements that must be fulfilled within a particular time frame.' *Lazarus*, 70 AD at 366-67. * * * " *Ibid.*

The Board decision in Mayes was rendered on March 3, 2005, and the amended PCB regulation requiring registration with the EPA by December 28, 1998 was promulgated as a final rule June 29, 1998. If in that seven-year period there had been any indication whatsoever that the EPA regarded Lazarus as having been overturned, or the analytical framework of Lazarus no longer applicable to the continuing obligation doctrine, it is unlikely that the Board would have quoted Lazarus as it did, without even a reference to any diminution of the controlling nature of Lazarus as authority for the continuing obligation doctrine.

To the contrary, in rendering its decision in Mayes, the Board went even further in relying

on Lazarus. It summarized the issue in Lazarus, described the PCB transformer registration requirement, and the purpose of the regulation, and then stated:

> "By reviewing the statute, legislative history, and regulations and regulatory history, the Board determined that Congress intended the PCB ban to be permanent and therefore the conditions of use authorizations for accepted uses, such as PCB transformers were continuing obligations necessary to effectively implement the congressional ban." 2005 EPA App. LEXIS 5, at 9, ¶1.

The Board then concluded in Mayes:

> "Accordingly, the Board held that failures to register PCB transformers and to mark PCB transformer access doors were continuing violations for statute * * * of limitations purposes, as Congress had rendered unlawful the use of such transformers at any time after the imposition of the PCB ban in 1978 unless conducted in compliance with the conditions of authorized use. (Citations omitted)" *Ibid.*

This holding then was an explicit reliance on Lazarus some seven years after the EPA amended the registration regulation to require registration with the EPA itself, as opposed to with first responders. Nothing in the Mayes opinion suggests that the EPA took any position in the Mayes case other than that Lazarus continued as authority for the proposition that where the Congress established a permanent ban, and conditional use exceptions to the ban, such exceptions would be allowed only if the conditions were complied with on a continuing basis. Certainly, had the EPA argued for any qualification on Lazarus as authority for the proposition just stated, or if the Environmental Appeals Board questioned that proposition, either or both qualifications would have been manifested in the opinion in Mayes. Since Mayes contained no such limited reading of Lazarus, it is submitted that Mayes, like Newell, stands for the proposition that Lazarus was entirely unaffected as authority for its holdings concerning the continuing obligations doctrine.

In Re: Rocky Well Service, Inc. & Edward J. Klockenkemper, 2010 WL 1715639 (E.P.A.) (March 30, 2010), was yet another case in which the respondents contended that their violations (in

this case the violations were of the Safe Drinking Water Act) were fixed and complete on the day they occurred, and the violators were free from sanction because the enforcement action was barred by the five-year statute of limitations. And once again the Environmental Appeals Board rejected the contention, holding instead that the violations at issue in that case were violations of continuing obligations, and therefore that the statute of limitations did not begin to run until the violations were abated. *Id.* at 13, ¶s 3 and 4. In doing so, the Board explicitly discussed and specifically relied on, *inter alia*, Lazarus, Newell and Mayes. *Id.* at 10, ¶s 1, 2 and 3. At no time did the Board suggest that the authority or analytical framework of Lazarus might have been diminished by the amendment in 1998 requiring transformer registration with the EPA instead of with first responders. In that connection it should be noted that the Environmental Appeals Board decision in Rocky Well Service was rendered at the end of March, 2010, after EPA filed its Complaint against Okonite on February 24, 2010.

Singly, and together, Lazarus, Newell, Mayes and Rocky Well Service establish that the language change from "as of" to "no later than" was not intended to and did not effect a fundamental change in the law of continuing obligations. Okonite therefore respectfully submits that the doctrine is viable, that the authority of Lazarus, Newell, Mayes and Rocky Well Service applies in the instant matter, and that despite Okonite's failure to register its two PCB transformers by December 28, 1998, its voluntary registration of them in April 2005 was fully effective to then bring Okonite into compliance with the regulation and applicable law.

POINT III

THE COMPLAINANT'S POSITION IN THIS ACTION IS INCONSISTENT WITH, AND IN FACT VIOLATES, THE UNDERLYING PURPOSES OF THE REGISTRATION REQUIREMENT FOR PCB TRANSFORMERS.

A.

Under the original version of 40 CFR §761.30(a)(1)(vi), PCB transformer users were required to register them by December 1, 1985 with the fire response personnel having primary jurisdiction to respond to a fire at the location of the transformers. The underlying purpose of the registration requirement was set forth plainly in the trial level decision in the Lazarus case, 1995 WL 441858 (EPA), at p.6:

> " * * * The regulation involved here requires PCB transformers to be registered with fire response personnel who need to know this information in responding to a fire because of the serious injury that can be caused both to the environment and to the response personnel when PCB Transformers are exposed to fire. * * * The danger of this injury exists so long as the PCB transformers are not registered. Thus, it is entirely reasonable to construe the duty to register as a continuing one and not a one-time obligation to register the PCB transformers on December 1, 1985."

The decision of the Environmental Appeals Board in Lazarus agreed with the lower court's description of the underlying purpose of the regulation. As the Board said:

> " * * * EPA chose transformer registration as one of a few controls to address the risk posed by fire-related incidents:
>
> > 'EPA has determined that * * * adding conditions and restrictions on the use of the remaining PCB Transformers (including * * * registration, and labeling) will significantly reduce the fire-related risks posed by the use of PCB Transformers.'
>
> " * * * Registration of transformers with fire departments was selected for the particular purpose of minimizing the exposure of emergency response personnel to PCBs and PCB combustion products during the course of fires involving PCB transformers. 'EPA expects that firefighters, aware of the nature of risks posed by

> a transformer fire, would be more likely to wear respiratory protection and protective clothing and would be more protective of bystanders and onlookers.' * * * The registration requirement was designed to require transmission of information that actually could be utilized by fire response personnel at the time of a fire. For example, the registration is to include information on the location of transformers and the name and telephone number of the person to contact in the event of a fire. See 40 C.F.R. §§ 761.30(a)(1)(vi)(A) and (C). In order to maintain the utility of the registration, it is reasonable to expect that changes in such information after the initial act of registration must be relayed to the appropriate fire response organization.
>
> "The Agency's use of phrases such as 'continued use' and 'remaining useful life of PCB Transformers' 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." (Citations omitted.) 7 E.A.D. 318, at 32.

As stated, the above quotations from the Lazarus trial court and Environmental Appeals Board decisions referred to the legislative history and underlying purpose of the 1985 regulation mandating PCB transformer regulation. And as Lazarus held, the goals referenced in the quotations were best served by construing the registration requirement to be a continuing obligation.

In the instant matter the EPA contends that when it amended 40 C.F.R. §761.30(a)(1)(vi)(A) on June 29, 1998 to require registration with the EPA instead of with first responders, the additional language change from "as of" to "no later than" reversed Lazarus and eliminated the continuing obligation to register which the EAB in Lazarus had found so important to the fulfillment of the underlying goals of the registration requirement. But the legislative history of the June 29, 1998 amended registration requirement reveals that the underlying goals of the requirement did not change from what they were when the 1985 registration regulation was adopted. If anything, the legislative history of the June 29, 1998 amended regulation makes clear that the amendment sought to strengthen and better implement those goals. Exhibit 2.

The quotations above from Lazarus reflect that one of those goals was that registration should be as broad and complete as possible. In the preamble to the June 29, 1998 promulgation of the final rule, the EPA reemphasized that goal and explained that by the amendment it hoped to achieve pervasive registration throughout the United States. The EPA first noted in the preamble that PCB transformers were required to have been registered with the local fire response personnel by December 1, 1985 to qualify for the continued use authorization. Exhibit 2. 63 FR 124, p.35392, column 3 (June 29, 1998). It then noted its disappointment with the regulated communities' compliance with that registration requirement:

> "Many fire departments, including those serving large cities, had not received registration information for a large percentage of those PCB Transformers which should have been registered." *Id.* at 35393, col.1.

The preamble to the June 29, 1998 final rule continued:

> "EPA believes that residents of every State would be better protected by a uniform, nationwide registration requirement, in which EPA would receive the data and make it available to Federal, State and local emergency or fire response personnel and to building owners." *Ibid.*

Commenting on the anticipated positive effect of the new rule establishing a national registration program, the EPA said that it would provide

> " * * * benefits that merely improving the enforcement of the existing fire rules cannot provide. For example, collecting the information nationally, in one database, provides transformer location information to all emergency responders, whether they are from the local volunteer fire department, from the state * * * or from the federal government." *Id.* at 35393, col. 2.

The EPA next described how it would manage the information it amassed under the transformer registration program. As it said:

> "The Agency intends to provide the information to state fire bureaus and other umbrella organizations for further dissemination to local fire departments. In

> addition, the Agency intends eventually to make the information available in an electronic database, probably on EPA's World Wide Web Homepage. * * * " *Id.* at 35393, col. 3.

Based on the above authorities, there can be no question about the nature of the underlying purpose of both the 1985 and 1998 registration requirements and no question that the goals were the same. As originally conceived, registration sought as an immediate goal the protection of first responders against the hazards posed by PCB transformer fires. Of no less importance is the protection of the environment, and hence of the society at large, against the hazards of release of PCBs and/or the byproducts of PCB combustion. To achieve these benefits, as confirmed by the EPA's disappointment expressed in the Preamble with the fact that "a large percentage of * * * PCB transformers had not been registered," maximum compliance with the registration requirement was, and is, desirable.

Okonite submits that it seems readily apparent that anything which impedes compliance with the goal of maximum registration compliance, and anything which provides a disincentive to maximum compliance with the registration requirement, vitiates the underlying goal. The construction of the registration being purveyed by the EPA in the instant matter is precisely such an impediment and disincentive. The numerous cases which involve a failure to register PCB transformers, also almost always involve other violations of the PCB regulations. See as an example such matters as In the Matter of: Greenwood Utilities, 2003 WL 22293682 (E.P.A.) (July 15, 2003), and In the Matter of: Russellville Electric Plant Board, 2002 WL 31264044 (E.P.A.) (June 28, 2002), which represent only the proverbial tip of the iceberg in EPA enforcement actions addressed to the PCB regulations.

While violations of PCB transformer regulations other than the registration requirement was certainly not true of Okonite as revealed by the EPA May, 2009 surprise inspection, the fact that failure to register is customarily accompanied by other violations signifies not the innocent mistake which accounts for Okonite's failure to register, but at best, a recalcitrant attitude on the part of facilities toward transformer safety as such, and toward the specific requirements of the PCB transformer regulations.

It would seem self-evident then that to the greatest extent possible, such recalcitrance must be overcome, to maximize the benefit of the regulatory scheme. The Court is certainly aware of the tools available to the EPA to overcome such recalcitrance, such as enforcement actions, publicizing the existence of the regulations, education of PCB transformer owners about the inherent dangers of PCBs, to name a few, and how compliance with the regulations at the very least minimizes, if it does not entirely eliminate, those dangers.

To the extent recalcitrant PCB transformer owners begin to appreciate by these means the need for compliance, the EPA construction of the registration requirement being contended for in the instant proceeding is counterproductive to the goal of the broadest possible registration. Were this Court to impose on the regulated community the EPA contention in the instant matter that if registration did not occur on December 28, 1998, the situation is hopeless and the violation irremediable, then any PCB transformer owner which overcame its recalcitrance would forfeit its transformers anyway. Thus if there is otherwise recalcitrance to register, and no hope of curing the violation, the hopelessness discourages registration. It also then encourages continued use of unregulated PCB transformers which may be leaking, which may not be properly marked, or which violate the other regulated parameters set forth in 40 C.F.R. §761.30.

On the other hand however, were this Court to continue to adhere to the doctrine of continuing obligation as promulgated in Lazarus, that late registration brings the PCB transformers into the public domain, without subjecting them to immediate forfeiture, then the calculus for the evolving recalcitrant owner becomes very different. The owner may continue to use them, provided however that the PCB transformers are brought into and stay in compliance with all the other mandates of 40 C.F.R. §761.30. This is the main and compelling purpose of the registration requirement — bringing PCB transformers into the public awareness and subjecting them to EPA scrutiny and evaluation under 40 C.F.R. §761.30. Okonite's view of the continuing nature of the registration obligation encourages attainment of that goal, and the EPA view being purveyed in the instant action frustrates it.

B.

The legislative history (Exhibit 2) of the amended 40 C.F.R. §761.30(a)(1)(vi)(A) also confirms in every respect the viability to the present of the four-step methodology adopted in Lazarus as the analytical framework for determining the existence of a continuing obligation.

The first of the four steps in the Lazarus analysis was its resort to TSCA itself. See the discussion in the instant brief at p.4, ¶3 to p.5, ¶1. From the date of the Lazarus decision to the present, the TSCA provisions did not change as they relate to the PCB ban/conditional exception subject. Therefore, the first of the four steps in the Lazarus analytical framework still applies.

The second component to the analytical framework in Lazarus was the Board's consideration of the preambles to the legislative adoption in 1985 of the registration regulation. See above, this brief, p.5, ¶2. Briefly reiterated, this consideration reflected the goals of reducing the risks of PCB transformer fires, enhancing the safety of first responders and the public, and having available the

means of contacting facility personnel in the event of an emergency. The preambles to the adoption of the June 29, 1998 final rule contain comments reiterating and in fact rededicating the EPA to these same goals, and indeed, to strengthening them. Those comments were quoted above in this brief at p.20, ¶1 to p.21,¶1, and are respectfully incorporated here by reference. See also, the EPA's description in the preamble and comment to the June 29, 1998 rule of the information to be included in the registration document. Exhibit 2, p.35394, col. 3, beginning of ¶2. Thus the second component of the Lazarus framework remained unchanged.

The third component to the analytical framework in Lazarus was the Board's acknowledgment of the reality that a fire could occur any time during the remaining useful life of a PCB transformer, and thus the obligation to register and subject PCB transformers to the regulatory program of the EPA was a continuing one. See above, this brief, p.5, ¶3. The preamble to the June 29, 1998 adoption of the final regulation confirms the very same concerns for subjecting PCB transformers to regulation. The EPA explained:

> "This information collection includes both reporting and record keeping requirements that are associated with the management of PCBs, PCB Items, and PCB waste. These reporting and record keeping requirements were implemented to ensure the Agency is knowledgeable of ongoing PCB activities (e.g., who, what, where) and that individuals using or disposing of PCBs are held accountable for their activities and can demonstrate compliance with the PCB provisions at 40 CFR part 761. EPA will use this information to ensure PCBs are managed in an environmentally safe manner and that activities are being conducted in compliance with the PCB regulations." Exhibit 2, p.35434, col. 2, ¶3.

The quoted comments reflect that in the EPA's mind nothing changed from the 1985 to the 1998 regulation about the exigencies attending the fact that a PCB transformer fire could occur at any time, and thus PCB transformers continued to require regulation designed to maximally attain registration, to inform the EPA, and derivatively through the EPA first responders and the public,

of the "who, what, where" of PCB transformer existence. The third component of the Lazarus framework thus remained unchanged.

It may be noted in passing that the Environmental Appeals Board in its decision in Mayes recognized the importance of addressing these exigencies, when it said:

> " * * * 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. * * * To conclude otherwise would produce an outcome difficult to reconcile with the policy objectives of the statute and regulations. * * * " (Citation omitted.) 2005 EPA App. *LEXIS 5*, at 46-47. Emphasis supplied.

The fourth component of the Lazarus methodology is reflected in the quotation from Lazarus above in this brief at p.6, ¶1. That quotation addressed the significance of the registration date of "December 1, 1985." Lazarus held that the date did not limit the applicability of the regulation to a particular time frame. It held the date was simply an effective date for the registration requirement.

In the instant matter the EPA contends that these holdings in Lazarus were overruled, and no longer had any effect, because instead of saying "as of," the regulation was amended to read "no later than." There are several answers to this contention. Nowhere in the extensive preamble or comments to the final rule does the EPA say that it sought to overrule Lazarus' holdings — in effect for 11 years by the time of the amendment — that the registration date provided an effective date for transformer registration, and did not create a one-time registration requirement. Exhibit 2. Okonite submits that on this basis, and on the basis of the analysis in Part C of this Point III, the fourth component of the Lazarus analytical framework was not changed by the amended regulation.

Nowhere in the preamble to and comments on the final rule did the EPA say that it was overruling the doctrine of continuing obligations that Lazarus applied to the registration requirement. Exhibit 2. Nowhere did the EPA express in the preamble or comments that it had any disagreement whatsoever with any of the legal analyses or with the social or environmental policies that Lazarus, Newell, Mayes and Rocky Well Service promulgated, and held were required or appropriate for attaining the beneficial goals of the registration requirements before them for adjudication.

C.

Finally, and Okonite submits that the following, independently of all other considerations in this Point, establishes that there is no basis whatsoever for the EPA's attempt in the instant case to build the inverted pyramid it now seeks to construct over "No later than." On December 6, 1994, the EPA published its notice of Proposed Rule. Exhibit 1, p.62788. In its notice of proposed rule making, the EPA made reference to the former 1985 registration regulation. It said that under the prior rule:

> "[I]n order to qualify for the current use authorization, all PCB Transformers were required to have been registered with fire response personnel **by** December 1, 1985 (S. 761.30(a)(1)(vi))." 59 Fed. Reg. 62820. Emphasis supplied.

The EPA'S Rebuttal Prehearing Exchange, therefore, draws a false distinction between the 1985 and 1998 regulations. The EPA states:

> "The 1985 requirement calls for the registration of PCB Transformers '[a]s of December 1, 1985,' while the current regulations require registration '[n]o later than December 28, 1998.' **The 1998 registration requirement imposed a deadline for PCB Transformer registration.** Any PCB Transformer not registered by December 28, 1998 is no longer authorized for use, pursuant to 40 C.F.R. S. 761.30(a)(1)(vi)(D)." Complainant's Rebuttal Prehearing Exchange at 4. Emphasis supplied.

The regulatory history quoted above demonstrates the 1985 registration requirement also

imposed a deadline for PCB Transformer registration ("Transformers were required to have been registered...**by** December 1, 1985"). Emphasis supplied. The notice of proposed rule making thus confirms in referencing "by", that the deadline date in both the 1985 and 1998 rules meant "by". Thus the EPA itself treated "as of" and "no later than" indistinguishably. Therefore, Lazarus is not distinguishable from the instant matter, and the EPA's contention to the contrary in its Rebuttal Prehearing Exchange is invalid.

POINT IV

UNDER CERTAIN APPLICABLE LEGAL PRINCIPLES GOVERNING THE CONDUCT OF ADMINISTRATIVE AGENCIES, THE COMPLAINANT SHOULD NEVER HAVE BROUGHT THE INSTANT ACTION, AND IS PRECLUDED FROM CONTINUING TO PROSECUTE IT.

There is something missing from the EPA's position in the instant matter, which is the answer to the question, "Why?" The goal of Congress' PCB ban and the PCB transformer regulations is ultimately that some time in the future there will no longer be PCB transformers in service.

Okonite understands that goal, and as a citizen as much dependent on a safe and healthy environment as any other, looks forward to the elimination of the threat that PCBs pose. As that goal applies to Okonite, there is no doubt that at some point in the future Okonite will remove the two transformers in question from service, as each approaches the end of its useful life. Putting aside momentarily the instant enforcement action, or assuming *arguendo* that it had never been brought or were to be dismissed, there is no question that Okonite's use of its two PCB transformers will be

permanently ended and they will be disposed of as required by law.

So the only real matter at issue between the EPA and Okonite is a question of timing. Putting aside the lack of merit in its legal position in the instant matter, the EPA's goal in this enforcement action is clear. It wants Okonite's two transformers out of service now. Okonite agrees that those transformers will go out of service, but seeks to avail itself of nothing more than what the PCB transformer regulations allow — namely, the painstakingly compliant operation of them to the end of their useful life. In this connection it should be noted, Okonite's business interests and the PCB transformer regulations coincide completely. As Okonite attempted to convey in its Prehearing Exchange, the operations of the Company as a whole, meaning its five factories across the United States, and its approximately 30 warehouses and regional sales offices across the United States[1] are all coordinated and ultimately controlled by Okonite's computer systems maintained at the Ramsey headquarters. Although a backup system is in place, the last thing that Okonite needs is a transformer failure at the Ramsey headquarters. Such an event, despite the existence of a backup system, would be devastating to the Company's operations. Thus whatever motivation to maintain its transformers in the exemplary state in which the EPA representatives found them on May 7, 2009 is engendered by the PCB regulations, that motivation is multiplied many times over by, and is totally consistent with, Okonite's business needs. So at an appropriate time from that dual standpoint, Okonite will remove the transformers in question from service.

Had Okonite not made the mistake that led to its failure to register its transformers by December 28, 1998, it would be in exactly the same position today that the PCB transformer

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[1]Okonite maintains no facilities anywhere outside the United States and outsources nothing.

regulations allow. That is, all the physical safeguards, markings, inspections and record keeping required by the regulations are being complied with, and in an exemplary manner at that.

In this context the EPA's bringing of the instant Complaint and continued prosecution of it is inexplicable. This action by the EPA is all the more incomprehensible when viewed in the additional context that 40 C.F.R. §761.30 contains numerous conditions for the continued use authorization of PCB transformers, over and above the registration requirement. The instances of enforcement action by the EPA against violations of those other conditions are extremely numerous. Yet in none of them has Okonite's research revealed a case in which the EPA has taken the position that violation of any of the other conditions imposed upon the continuing use of PCB transformers results in an immediate forfeiture of the right to continue using such transformers. Indeed, in the Lazarus, Newell and Mayes cases it was held that marking of access doors was a continuing obligation, just as the obligation to register, and yet in none of the cases Okonite has been able to locate has the EPA taken the position that failure as of December 28, 1998 to have the appropriate marking on access doors resulted in forfeiture of the further use of the transformers.

Added to this enforcement pattern ever since December 28, 1998 is the fact that the EPA itself in the cases discussed above in Point II took exactly the opposite position concerning the registration requirement to the one it now takes against Okonite in the instant matter. In Lazarus, Newell, Mayes and Rocky Well Service and the other cases referenced in Point II the EPA took the position that the registration obligation was a continuing one. Every time it made that contention, at least as far as the reported decisions reflect, EPA prevailed in that position.

Given the enforcement history reflected in the case reports as just stated, and given the EPA's positions in litigated enforcement actions, its conduct in bringing and continuing to prosecute the

instant matter violates the principle, articulated in Greyhound Corporation v. Interstate Commerce Commission, 551 F.2d 414 (DC Cir. 1977), as follows:

> " * * * [an administrative] agency is free to make reasoned changes in its policies. However, as this court noted in *Columbia Broadcasting System, Inc. v. F.C.C., supra*, there is an 'equally essential proposition that, when an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law.' *147 U.S. App. D.C. at 183, 454 F.2d at 1026* [footnote omitted]." 551 F.2d at 416.

In invalidating the administrative action there under consideration, the court in Greyhound held further:

> "Finally, the ICC has not only deviated in this case from its own standards; the Commission has also reached a result inconsistent with the agency's **precedents**." Emphasis in the original. *Id.* at 417.

The court in Greyhound concluded:

> "In sum, the ICC has deviated from the results which it has decreed in the past as well as from the standards the agency has applied to reach those results. The ICC would do well to heed the warning we gave to the Federal Communications Commission in *Columbia Broadcasting System, Inc. v. F.C.C.*:
>
> > 'Faced with two facially conflicting decisions, the Commission was duty bound to justify their coexistence. The Commission's utter failure to come to grips with this problem constitutes an inexcusable departure from the essential requirement of reasoned decision making.'" *Id.* at 417-418.

Substantially to the same effect is the decision in Donovan, Secretary of Labor v. Adams Steel Erection Inc., 766 F.2d 804 (3rd Cir. 1985), where the court held, in relevant part, as follows:

> " * * * It is settled that where an agency departs from established precedent without announcing a principled reason for such a reversal, its action is arbitrary, * * * and an abuse of discretion * * * ." (Citations omitted) 766 F.2d at 807.

In invalidating the agency action under consideration there, the court in Donovan concluded:

> " * * * We perceive no reasoned basis for the Commission's decision to overrule **established precedent** and therefore conclude that it acted arbitrarily, * * * and that its 'inexplicable departure from established policies' constitutes an abuse of discretion, * * * . Accordingly, its decision to vacate the first citation must be rejected. * * *. (Emphasis in the original) (Citations omitted) 766 F.2d at 810.

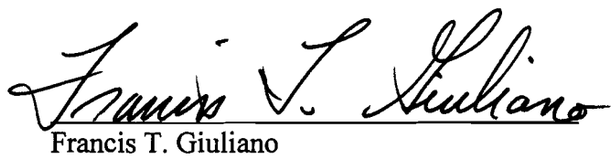
The conduct of the EPA in bringing the instant matter, and continuing to prosecute it, violates the principles articulated in the cases cited above. The EPA's treatment of the registration requirement differently from every other parameter establishing a condition on use authorization, with no support for doing so in the legislative history or in any of the cases, is reason enough in and of itself for this Court to hold on the basis of the above authority that the EPA acted arbitrarily and unreasonably in bringing the instant matter in the first place, and for this Court to hold that a continued prosecution of this matter by the EPA is invalid. In addition, and even more compelling however is the striking departure of the EPA by bringing the instant matter and continuing to prosecute it despite its earlier litigated matters, particularly as in Lazarus, Newell, Mayes and Rocky Well Service. Moreover, the fact that in all of these litigated matters the Environmental Appeals Board decided in the EPA's favor, further demonstrates arbitrariness and unreasonableness in the instant matter so extreme as to border on meretricious litigation.

For the reasons expressed in this Point, Okonite respectfully requests that the Court hold that the EPA is precluded in this litigation from contending that Okonite's late registration was a nullity, and that Okonite is not legally permitted the continued use of the two transformers which are the subject of this proceeding.

CONCLUSION

Okonite respectfully submits that the only appropriate outcome of the instant proceedings is a dismissal of the Complaint. That outcome would be justified were the Court to accept any of the arguments made in Points I through IV in this brief, each of which Points Okonite submits is independent of the other from the standpoint of the effectiveness of each to serve as a basis for dismissing the Complaint. On the other hand, if Okonite has been unpersuasive in all of these Points, and the Court adopts the construction of 40 C.F.R. §761.30(a)(1)(vi)(A) which the Complainant urges upon the Court, namely that Okonite's violation was complete and incurable on December 28, 1998, then the five-year statute of limitations began to run on that date, and the instant action thus became barred on December 28, 2003, almost seven years before the EPA filed this action. On either basis as set forth in this Conclusion, Okonite respectfully requests that the Complaint against it be dismissed.

Respectfully submitted,



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October 16, 2010

By FedEx #794016832488
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 Court's directive set forth in the Order Scheduling Oral Argument dated September 8, 2010, and Your Honor's Order granting an extension of time to file to October 18, 2010, we enclose two copies of Brief on behalf of Respondent The Okonite Company, Inc.

By copy of this letter we are filing the original and one copy with the Regional Hearing Clerk, and two copies with the Regional Counsel. An envelope has been provided to the Regional Hearing Clerk for the return of the extra copy stamped filed.

We appreciate the Court's courtesies.

Respectfully yours,

Francis T. Giuliano

Enclosures
G102998/F126A

cc: Karen Maples, Regional Hearing Clerk (by FedEx #796349317833) (original, 1 copy)
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