

U.S. Environmental Protection Agency
Region 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2010 FEB 24 PM 2:58
REGIONAL HEARING
CLERK

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In the Matter of :
The Okonite Company, Inc., : COMPLAINT AND NOTICE OF
Respondent. : OPPORTUNITY FOR HEARING
Proceeding under Section 16(a) of :
the Toxic Substances Control Act. : Docket No.
----- X TSCA-02-2010-9104

COMPLAINT

Complainant, as and for her Complaint against Respondent, hereby alleges upon information and belief:

1. This is a civil administrative action instituted pursuant to Section 16(a), 15 U.S.C. § 2615(a), of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 *et seq.*
2. The Complainant is the Director, Division of Enforcement and Compliance Assistance, United States Environmental Protection Agency ("EPA"), Region 2, who has been duly delegated the authority to institute this action.
3. This Complaint serves notice of Complainant's preliminary determination that Respondent has violated the federal regulations concerning polychlorinated biphenyls ("PCBs") promulgated pursuant to the authority granted by Section 6(e) of TSCA, 15 U.S.C. § 2605(e), and set forth at 40 C.F.R. Part 761, and that Respondent has thereby violated Section 15 of TSCA, 15 U.S.C. § 2614.
4. Respondent is The Okonite Company, Inc.
5. Respondent owns, operates, and/or controls the facilities in and around 102 Hilltop Road, Ramsey, New Jersey (hereinafter "Respondent's facility").
6. Respondent is a "person" within the meaning of 40 C.F.R. § 761.3.

7. Respondent has owned, used and maintained, or stored for reuse or disposal "PCBs" and "PCB Items", as those terms are defined at 40 C.F.R. § 761.3, at Respondent's facility.

8. Respondent is subject to the regulations and requirements pertaining to PCBs and PCB Items promulgated pursuant to Section 6(e) of TSCA, 15 U.S.C. § 2605(e), and set forth at 40 C.F.R. Part 761.

9. On or about May 7, 2009, duly designated representatives of the EPA conducted an inspection of and at Respondent's facility pursuant to Section 11 of TSCA, 15 U.S.C. § 2610 (hereinafter "the inspection").

COUNT 1

Unauthorized Use – Main Building

10. Paragraphs 1 through 9, above, are incorporated and realleged as if fully set forth herein.

11. Pursuant to 40 C.F.R. § 761.20(a), no person may use any PCB, or any PCB Item regardless of concentration, in any manner other than in a totally enclosed manner within the United States unless authorized under 40 C.F.R. § 761.30.

12. In accordance with the regulations at 40 C.F.R. § 761.30(a)(1)(vi)(A), all owners of PCB Transformers, including those in storage for reuse, were required to register their transformers with the Environmental Protection Agency no later than December 28, 1998.

13. Pursuant to 40 C.F.R. § 761.30 (a)(1)(vi)(D), a transformer owner must comply with all requirements of 40 C.F.R. § 761.30 (a)(1)(vi)(A) in order to continue a PCB Transformer's authorization for use or storage for reuse pursuant to this section and TSCA Section (6)(e)(2)(B).

14. As of the date of the EPA inspection, Respondent was using a transformer at the location commonly referred to as behind the Main Building at Respondent's facility.

15. The transformer described in paragraph 14, above, is a "PCB Transformer" and a "PCB Item" as those terms are defined at 40 C.F.R. § 761.3.

16. Respondent registered the PCB Transformer described in paragraphs 14 and 15, above, with the Environmental Protection Agency on April 5, 2005.

17. Respondent's use of a PCB Transformer which was not registered with the Environmental Protection Agency by December 28, 1998, as described in paragraphs 14 through 16, above, constitutes the unauthorized use of PCBs.

18. Respondent's unauthorized use of PCBs, as alleged in paragraph 17, above, constitutes a failure or refusal to comply with 40 C.F.R. §§ 761.20 and 761.30(a)(1)(vi), which is a violation of Section 15(1)(C) of TSCA, 15 U.S.C. § 2614(1)(C).

COUNT 2

Unauthorized Use – Utility Building

19. Paragraphs 1 through 9, above, are incorporated and realleged as if fully set forth herein.

20. Pursuant to 40 C.F.R. § 761.20(a), no person may use any PCB, or any PCB Item regardless of concentration, in any manner other than in a totally enclosed manner within the United States unless authorized under 40 C.F.R. § 761.30.

21. In accordance with the regulations at 40 C.F.R. § 761.30(a)(1)(vi)(A), all owners of PCB Transformers, including those in storage for reuse, were required to register their transformers with the Environmental Protection Agency no later than December 28, 1998.

22. Pursuant to 40 C.F.R. § 761.30 (a)(1)(vi)(D), a transformer owner must comply with all requirements of 40 C.F.R. § 761.30 (a)(1)(vi)(A) in order to continue a PCB Transformer's authorization for use or storage for reuse pursuant to this section and TSCA Section (6)(e)(2)(B).

23. As of the date of the EPA inspection, Respondent was using a transformer at the location commonly referred to as the Utility Building at Respondent's facility.

24. The transformer described in paragraph 23, above, is a "PCB Transformer" and a "PCB Item" as those terms are defined at 40 C.F.R. § 761.3.

25. Respondent registered the PCB Transformer described in paragraphs 23 and 24, above, with the Environmental Protection Agency on April 5, 2005.

26. Respondent's use of a PCB Transformer which was not registered with the Environmental Protection Agency by December 28, 1998, as described in paragraphs 23 through 25, above, constitutes the unauthorized use of PCBs.

27. Respondent's unauthorized use of PCBs, as alleged in paragraph 26, above, constitutes a failure or refusal to comply with 40 C.F.R. §§ 761.20 and 761.30(a)(1)(vi), which is a violation of Section 15(1)(C) of TSCA, 15 U.S.C. § 2614(1)(C).

PROPOSED CIVIL PENALTY

The proposed civil penalty has been determined in accordance with Section 16 of TSCA, 15 U.S.C. § 2615, which authorizes the assessment of a civil penalty of up to \$25,000 per day for each violation of TSCA and the regulations promulgated pursuant thereto. As per the Civil Monetary Penalty Inflation Adjustment Final Rule dated December 31, 1996, effective January 30, 1997, any violation may be assessed up to \$32,500 for each violation after that effective date [61 Fed. Reg. 69359 (1996)].

For purposes of determining the amount of any penalty to be assessed, Section 16 of TSCA requires EPA to take into account the nature, circumstances, extent and gravity of the violations. Section 16 of TSCA also requires EPA to take into account the following with respect to the violator: ability to pay, effect of the penalty on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

To develop the proposed penalty in this Complaint, Complainant has taken into account the particular facts and circumstances of this case, to the extent known at this time, with specific reference to EPA's "Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act," which was published on September 10, 1980 in the Federal Register (45 Fed. Reg. 59,770), and EPA's April 9, 1990 "PCB Penalty Policy". A copy of each is enclosed. These policies provide rational, consistent and equitable calculation methodologies for applying the statutory penalty factors enumerated above to particular cases.

The Complainant proposes, subject to receipt and evaluation of further relevant information, that Respondent be assessed the following civil penalties for the violations alleged in the Complaint:

COUNT 1: Unauthorized Use – Main Building

Circumstance Level - 2

Major use

Extent Category - **Significant**

Amount between 220 and 1,100 gallons

Number of Locations: 2

Proposed Penalty for this Count:

\$16,764

COUNT 2: Unauthorized Use – Utility Building

Circumstance Level - 2

Major use

Extent Category - **Significant**

Amount between 220 and 1,100 gallons

Proposed Penalty for this Count:

\$16,764

Total Proposed Penalty:

\$33,528

In accordance with Agency policies regarding modifications to the relevant penalty policies, the total gravity-based penalty amount is rounded to the nearest unit of 100 dollars.

Total Proposed Penalty (rounded off per EPA policy):

\$33,500

PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

The rules of procedure governing this civil administrative litigation have been set forth in 64 Fed. Reg. 40138 (July 23, 1999), entitled, "Consolidated Rules of Practice Governing the Administrative Assessments of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits", and which are codified at 40 C.F.R. Part 22. A copy of these rules accompanies this "Complaint and Notice of Opportunity for Hearing" (hereinafter referred to as the "Complaint").

A Answering The Complaint

Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty is inappropriate or to contend that Respondent is entitled to judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written Answer to the Complaint. 40 C.F.R. § 22.15(a). While that provision requires that an Answer must be filed within 30 days after service of a Complaint, EPA, Region 2, has administratively extended the deadline for such filing in this proceeding, and Respondent's Answer accordingly must be filed within 90 days of service of the Complaint. The address of the Regional Hearing Clerk of EPA, Region 2, is:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866

Respondent shall also then serve one copy of the Answer to the Complaint upon Complainant and any other party to the action. 40 C.F.R. § 22.15(a).

Respondent's Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Complaint and with regard to which Respondent has any knowledge. 40 C.F.R. § 22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in its Answer, the allegation is deemed denied. 40 C.F.R. § 22.15(b). The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that Respondent disputes (and thus intends to place at issue in the proceeding) and (3) whether Respondent requests a hearing. 40 C.F.R. § 22.15(b).

Respondent's failure affirmatively to raise in the Answer facts that constitute or that might constitute the grounds of its defense may preclude Respondent, at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a hearing.

B. Opportunity To Request A Hearing

If requested by Respondent in its Answer, a hearing upon the issues raised by the Complaint and Answer may be held. 40 C.F.R. § 22.15(c). See generally Section 16(a)(2)(A) of TSCA, 15 U.S.C. § 2615(a)(2)(A). If, however, Respondent does not request a hearing, the

Presiding Officer (as defined in 40 C.F.R. § 22.3) may hold a hearing if the Answer raises issues appropriate for adjudication. 40 C.F.R. § 22.15(c).

Any hearing in this proceeding will be held at a location determined in accordance with 40 C.F.R. § 22.21(d). A hearing of this matter will be conducted in accordance with the applicable provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, and the procedures set forth in Subpart D of 40 C.F.R. Part 22.

If Respondent fails to request a hearing, such failure may operate to preclude Respondent from obtaining judicial review of an adverse EPA final order. See 16 U.S.C. § 2615(a)(3), which states, in part: "Any person who requested in accordance with paragraph (2)(A) [15 U.S.C. § 2615(a)(2)(A)] a hearing respecting the assessment of a civil penalty and who is aggrieved by an order assessing a civil penalty may file a petition for judicial review with the United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business".

C. Failure To Answer

If Respondent fails in its Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation. 40 C.F.R. § 22.15(d). If Respondent fails to file a timely [*i.e.* in accordance with the period set forth in 40 C.F.R. § 22.15(a); extended to 90 days for this Complaint] Answer to the Complaint, Respondent may be found in default upon motion. 40 C.F.R. § 22.17(a). Default by Respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a). Following a default by Respondent for a failure to timely file an Answer to the Complaint, any order issued therefore shall be issued pursuant to 40 C.F.R. § 22.17(c).

Any penalty assessed in the default order shall become due and payable by Respondent without further proceedings 30 days after the default order becomes final pursuant to 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d). If necessary, EPA may then seek to enforce such final order of default against Respondent, and to collect the assessed penalty amount, in federal court.

D. Exhaustion Of Administrative Remedies

Where Respondent fails to appeal an adverse initial decision to the Environmental Appeals Board pursuant to 40 C.F.R. § 22.30, and that initial decision thereby becomes a final order pursuant to the terms of 40 C.F.R. § 22.27(c), Respondent waives its right to judicial review. 40 C.F.R. § 22.27(d).

In order to appeal an initial decision to the Agency's Environmental Appeals Board [EAB; see 40 C.F.R. § 1.25(e)], Respondent must do so "within 30 days after the initial decision is served". 40 C.F.R. § 22.30(a). Pursuant to 40 C.F.R. § 22.07(c), where service is effected by mail, "five days shall be added to the time allowed by these rules for the filing of a responsive pleading or document". Note that the 45-day period provided for in 40 C.F.R. § 22.27(c) [discussing when an initial decision becomes a final order] does not pertain to or extend the time period prescribed in 40 C.F.R. § 22.30(a) for a party to file an appeal to the EAB of an adverse initial decision.

INFORMAL SETTLEMENT CONFERENCE

Whether or not Respondent requests a formal hearing, EPA encourages settlement of this proceeding consistent with the provisions of the Act and its applicable regulations. 40 C.F.R. § 22.18(b). At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in this Complaint, and Respondent may also provide whatever additional information that it believes is relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged, (2) any information relevant to Complainant's calculation of the proposed penalty, (3) the effect the proposed penalty would have on Respondent's ability to continue in business and/or (4) any other special facts or circumstances Respondent wishes to raise.

Complainant has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement agreement reached with Respondent, to reflect any relevant information previously not known to Complainant, or to dismiss any or all of the charges if Respondent can demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists. Respondent is referred to 40 C.F.R. § 22.18.

Any request for an informal conference or any questions that Respondent may have regarding this Complaint should be directed to the EPA staff member listed below:

Ann Finnegan, Life Scientist
Pesticides and Toxic Substances Branch
U.S. Environmental Protection Agency, Region 2
2890 Woodbridge Avenue MS 105
Edison, New Jersey 08837-3679
(732) 906-6177

The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing. 40 C.F.R. § 22.18(b)(1). Respondent's requesting a formal hearing does not prevent it from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Complaint. Complainant does not deem a request for an informal settlement conference as a request for a hearing as specified in 40 C.F.R. § 22.15(c).

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 C.F.R. § 22.15. No penalty reduction, however, will be made simply because an informal settlement conference is held.

Any settlement that may be reached as a result of an informal settlement conference shall be embodied in a written consent agreement. 40 C.F.R. § 22.18(b)(2). In accepting the consent agreement, Respondent waives its right to contest the allegations in the Complaint and waives its right to appeal the final order that is to accompany the consent agreement. 40 C.F.R. § 22.18(b)(2). In order to conclude the proceeding, a final order ratifying the parties' agreement to settle will be executed. 40 C.F.R. § 22.18(b)(3).

Respondent's entering into a settlement through the signing of such Consent Agreement and its complying with the terms and conditions set forth in the such Consent Agreement terminate this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Respondent's entering into a settlement does not extinguish, waive, satisfy or otherwise affect its obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

Instead of filing an Answer, Respondent may resolve this proceeding by paying the specific penalty proposed in the Complaint. 40 C.F.R. § 22.18(a). Payment of the penalty assessed should be made by sending a cashier's or certified check payable to the "Treasurer, United States of America", in the full amount of the penalty assessed in this Complaint to the following addressee:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000.

The check shall be identified with a notation of the name and docket number of this case, set forth in the caption on the first page of this document.

Alternatively, payment may be made by Electronic Fund Transfer (EFT) directed to the Federal Reserve Bank of New York. Respondent shall provide the following information to its remitter bank:

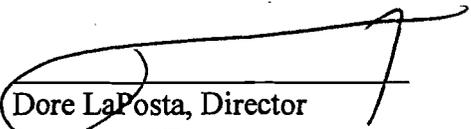
- 1) Amount of Payment
- 2) SWIFT address: FRNYUS33, 33 Liberty Street, New York, NY 10045
- 3) Account: 68010727
- 4) ABA number: 021030004
- 5) Field Tag 4200 of the Fedwire message should read "D 68010727
Environmental Protection Agency"
- 6) Name of Respondent
- 7) Docket Number

A copy of the check or other instrument of payment shall be filed with the Regional Hearing Clerk, Region 2 (at the New York address noted above), and a copy provided to the EPA staff member identified previously.

Pursuant to 40 C.F.R. § 22.18(a)(3), upon EPA's receipt of such payment, the Regional Administrator of EPA, Region 2 (or, if designated, the Regional Judicial Officer), shall issue a final order. Issuance of this final order terminates this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Further, pursuant to 40 C.F.R. § 22.18(a)(3), the making of such payment by Respondent shall constitute a waiver of

Respondent's right both to contest the allegations made in the Complaint and to appeal said final order to federal court. Such payment does not extinguish, waive, satisfy or otherwise affect Respondent's obligation and responsibility to comply with all applicable regulations and requirements, and to maintain such compliance.

Dated: NOVEMBER 27, 2009



Dore LaPosta, Director
Division of Enforcement and
Compliance Assistance
U.S. Environmental Protection Agency - Region 2
290 Broadway
New York, NY 10007

To: Mr. Victor Viggiano, CEO
The Okonite Company, Inc.
102 Hilltop Road
Ramsey, NJ 07446

Enclosures

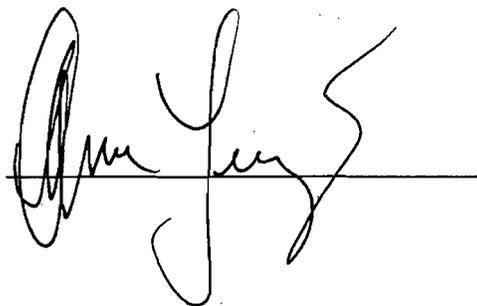
In the Matter of The Okonite Company, Inc.
Docket No. TSCA-02-2010-9104

CERTIFICATE OF SERVICE

This is to certify that on the 2 day of December, 2009, I have served a true and correct copy of the foregoing Complaint and Notice of Opportunity for Hearing, bearing Docket Number TSCA-02-2010-9104, and a copy of the Consolidated Rules of Practice, 40 C.F.R. Part 22 (64 Federal Register 40138 [July 23, 1999]), by certified mail, return receipt requested, to:

Mr. Victor Viggiano, CEO
The Okonite Company, Inc.
102 Hilltop Road
Ramsey, NJ 07446

On the same date, I mailed via EPA internal mail to the Region 2 Regional Hearing Clerk at 290 Broadway, New York, New York 10007 the original and one copy of the foregoing Complaint and Notice of Opportunity for Hearing.

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