

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

2010 OCT 18 P 3: 52

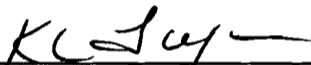
REGIONAL HEARING
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In the Matter of	:	
The Okonite Company, Inc.,	:	Docket No. TSCA-02-2010-9104
Respondent.	:	Hon. Barbara A. Gunning Presiding Officer
Proceeding under Section 16(a) of the Toxic Substances Control Act.	:	
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COMPLAINANT'S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

Complainant, the Director of the Division of Enforcement and Compliance Assistance, U.S. Environmental Protection Agency ("EPA" or "Agency"), Region 2, by and through Region 2's Office of Regional Counsel, herewith provides this Brief, in accordance with the Court's Order Scheduling Oral Argument, dated September 8, 2010, and modification of this schedule on October 12, 2010.

Respectfully submitted,



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Dated: October 18, 2010

U.S. ENVIRONMENTAL
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COMPLAINANT'S BRIEF

Complainant, the Director of the Division of Enforcement and Compliance Assistance, United States Environmental Protection Agency ("EPA" or "Agency"), Region 2, by and through Region 2's Office of Regional Counsel, hereby submits this Brief in accordance with the Court's Order Scheduling Oral Argument, dated September 8, 2010.

I. LITIGATION HISTORY

On September 23, 2009, Complainant sent the Respondent a Notice of Opportunity with Respect to Action under the Toxic Substances Control Act ("TSCA"). Complainant and Respondent held a settlement conference on October 14, 2009, but were unable to reach a settlement agreement. Complainant then commenced an action under the authority of Section 16(a) of TSCA, 15 U.S.C. § 2615(a). The Complaint and Notice of Opportunity for Hearing ("Complaint"), served on December 3, 2009,¹ alleges

¹ The U.S. Post Office return receipt date stamp indicates that Respondent received the Complaint on December 3, 2009. Therefore, the Complaint was served on December 3, 2009. 40 C.F.R. § 22.7(c) ("Service of the complaint is complete when the return receipt is signed.").

Respondent's unauthorized use of two (2) polychlorinated biphenyl ("PCB") transformers or "PCB Transformers" as that term is defined in Section 761.3 of Title 40 of the Code of Federal Regulations ("C.F.R."). The Complaint alleges in two (2) counts that Respondent was using two PCB Transformers at its location in Ramsey, New Jersey without complying with all requirements of 40 C.F.R. Section 761.30 (a)(1)(vi)(A). Specifically, Respondent failed to register said transformers with the EPA no later than December 28, 1998, in violation of the regulations found at 40 C.F.R. Sections 761.20 and 761.30. The Complaint seeks a total civil administrative penalty of \$33,500.² On February 22, 2010, Respondent filed its Answer to the Complaint ("Answer"). On April 28, 2010, an Alternative Dispute Resolution conference was held, but the parties were unable to reach a negotiated settlement.

In accordance with the Court's Prehearing Order, dated May 4, 2010, Complainant submitted its prehearing exchange on July 1, 2010 ("Complainant's Prehearing Exchange"). Respondent submitted its prehearing exchange on August 6, 2010 ("Respondent's Prehearing Exchange"). Complainant submitted a rebuttal prehearing exchange on August 26, 2010 ("Complainant's Rebuttal Exchange"). The Court issued an Order Scheduling Oral Argument, dated September 8, 2010, and modification of this schedule on October 12, 2010.

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See narrative accompanying the Complaint and Complainant's Prehearing Exchange for a full explanation of the penalty calculation. Note that the PCB Transformers are "approximately 400 feet" apart. (Respondent's Prehearing Exchange, page 3). One count is warranted for each location that presents a separate and distinct risk. (Complainant's Exhibit 5, PCB Penalty Policy, page 13). Outside, PCBs are separate when they are at least 100 feet apart. *See id.* While failure to register PCB Transformers with the fire department at separate locations within one facility may have been consolidated into one violation *id.* EPA Region 2 assesses one count for each location for unauthorized use of PCB Transformers in violation of the current registration requirement as each location represents a separate and distinct risk.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Statutory Authority

In 1976, the Congress enacted the Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.* ("TSCA"), which banned the manufacture, processing, and distribution in commerce of PCBs (a) except in a "totally enclosed manner" and (b) except as authorized by EPA regulations if EPA found that such activity would not present an unreasonable risk of injury to health or the environment. TSCA § 6(e)(2), 15 U.S.C. § 2605(e)(2). Statements of Congressional findings, policy and intent were included in the enactment. TSCA § 2, 15 U.S.C. § 2601.

1. Congressional Findings, Policy and Intent

The Congress found that (1) human beings and the environment were being exposed each year to a large number of chemical substances and mixtures; and, (2) among the many chemical substances, there were some whose use or disposal may present an unreasonable risk of injury to health or the environment. TSCA § 2(a), 15 U.S.C. § 2601(a).

Congress announced a policy that "adequate authority should exist to regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment, and to take action with respect to chemical substances and mixtures which are imminent hazards." TSCA § 2(b), 15 U.S.C. § 2601(b).

The intent Congress provided was that "the Administrator shall carry out this chapter in a reasonable and prudent manner, and that the Administrator shall consider

the environmental, economic, and social impact of any action the Administrator takes or proposes to take under this chapter.” TSCA § 2(c), 15 U.S.C. § 2601(c).

2. Polychlorinated Biphenyls (PCBs)

a) PCB Ban

An integral and extraordinary part of the scheme of TSCA is the Congressional ban on the use of PCBs, a key component in the generation and distribution of electricity in the United States, after January 1, 1978. The statute reads as follows:

Except as provided under subparagraph (B), effective one year after January 1, 1977, no person may manufacture, process, or distribute in commerce or use any polychlorinated biphenyl in any manner other than in a totally enclosed manner.

TSCA § 6(e)(2)(A), 15 U.S.C. § 2605(e)(2)(A).

b) Use Authorization

Exceptions to the ban on PCB uses in any manner other than a totally enclosed manner are those uses which the EPA finds will not present an unreasonable risk of injury to health or the environment. The relevant TSCA sections are as follows:

The Administrator may by rule authorize the manufacture, processing, distribution in commerce or use (or any combination of such activities) of any polychlorinated biphenyl in a manner other than in a totally enclosed manner if the Administrator finds that such manufacture, processing, distribution in commerce, or use (or combination of such activities) will not present an unreasonable risk of injury to health or the environment.

TSCA § 6(e)(2)(B), 15 U.S.C. § 2605(e)(2)(B).

For the purposes of this paragraph, the term “totally enclosed manner” means any manner which will ensure that any exposure of human beings or the environment to a polychlorinated biphenyl will be insignificant as determined by the Administrator by rule.

TSCA § 6(e)(2)(C), 15 U.S.C. § 2605(e)(2)(C).

3. Prohibited Acts

TSCA expressly prohibits failure to comply with regulations promulgated under the authority of the act and failure to submit reports required by such regulations. It is unlawful under TSCA for any person to: “(1) fail or refuse to comply with . . . (B) any requirement prescribed by section . . . 2605 of [TSCA], (C) any rule promulgated or order issued under section . . . 2605 of [TSCA]” and to “(3) fail or refuse to (A) establish or maintain records, (B) submit reports, notices, or other information . . . as required by this chapter or a rule thereunder.” TSCA § 15(1) and (3), 15 U.S.C. § 2614(1) and (3).

4. Penalties

TSCA provides that any person who violates a provision of TSCA section 2614 “shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of section 2614 . . . of this title.” TSCA § 16(a)(1), 15 U.S.C. § 2615(a)(1). The maximum penalty was later adjusted upward to \$32,500 per day for each violation by the Civil Monetary Penalty Inflation Adjustment Final Rule for violations occurring after March 15, 2004 and to \$37,500 for violations after January 12, 2009. 40 C.F.R. Part 19.

5. Judicial Review

Section 19 of TSCA provides for judicial review of regulations promulgated by EPA pursuant to the authority granted by the Act. Section 19 of TSCA reads in part:

Not later than 60 days after the date of the promulgation of a rule under section . . . 2605(e) . . . any person may file a petition for judicial review of such rule with the United States Court of Appeals for the District of Columbia Circuit or for the circuit in which such person resides or in which such person’s principal place of

business is located. Courts of appeals of the United States shall have exclusive jurisdiction of any action to obtain judicial review (other than in an enforcement proceeding) of such a rule if any district court of the United States would have had jurisdiction of such action but for this subparagraph.

TSCA § 19(a)(1)(A), 15 U.S.C. § 2618(a)(1)(A).

B. Legislative History

TSCA's legislative history reveals that one purpose of the Act is "to prevent unreasonable risks of injury to health or the environment associated with the . . . use or disposal of chemical substances." S. Rep. No. 94-698, at 1 (1976). TSCA is "designed to fill a number of regulatory gaps which currently exist." *Id.* Congress recognized a void in the regulatory scheme for chemicals in that there was no agency which had the authority to look comprehensively at the hazards associated with the chemicals. *Id.* There was "clearly a need for regulatory authority which can, where possible, identify and control the introduction of harmful substances into the environment before damage to health or the environment occurs" and permit "regulation of toxic chemicals at points in . . . use that are impossible to reach under existing laws." *Id.* at 46 (Views of Rep. Baker). There were inadequacies in the existing authorities to deal with "the recognized harm presented by polychlorinated biphenyls." H. Rep. 94-1341 (Interstate and Foreign Commerce Committee), at 6 (1976). The EPA could control discharge of PCBs into the waters under the Federal Water Pollution Control Act. *Id.* "However, there [were] no means for regulating other avenues through which the environment is exposed to PCBs." *Id.* The new law "would grant the Environmental Protection Agency the authority to look at the hazards in total." S. Rep. No. 94-698, at 1.

Certain chemicals were discovered to present lethal health and environmental dangers. *Id.* Among the list of “commonly utilized and widely dispersed chemicals . . . found to be potentially significant health and environmental dangers” were PCBs which were “found to cause liver cancer in rats and to have contaminated numerous fish stocks throughout the United States.” *Id.* at 3. The National Cancer Institute estimated that “60 to 90 percent of the cancers occurring in this country are a result of environmental contaminants.” *Id.* at 4. “Polychlorinated biphenyls (PCBs) had been used for forty years and approximately 390,000 tons had been released into the environment before they were recognized as an enduring environmental poison. Unfortunately, such recognition came too late to prevent contamination of such major water systems as the Great Lakes and the Hudson River.” S. Rep. No. 94-698, at 6 (1976). PCB was considered a “known bad actor” due to its “toxicity and danger to the environment.” *In re Lazarus*, 7 E.A.D. 318, 369 (1997) (citing 122 Cong. Rec. 27,186 (1976) (statement of Rep. Gude)).

TSCA granted the EPA a restrictive authority over chemicals. “Restrictive requirements may be prescribed for any chemical substance or mixture which presents or is likely to present an unreasonable risk of injury to health or the environment. Remedies available to the Administrator range from outright prohibitions to simple labeling requirements.” H. Rep. 94-1341 (Interstate and Foreign Commerce Committee), at 7 (1976) (emphasis added). The EPA is authorized to collect information which would allow the EPA to assess and take action against chemicals causing unreasonable risks. *Id.* at 8. In response to arguments concerning TSCA’s

grant of authority to the EPA, the Senate Report stated that the law does not contain excessive authority for the EPA. *Id.* at 9. In the provisions at TSCA section 6 (relating to restrictive authority), the EPA is “directed to consider costs and benefits when deriving appropriate rules.” *Id.* at 9. The Senate Report further stated that “[u]nder the rulemaking provisions of section 6, an informal hearing must be provided with rights of cross-examination granted in appropriate instances” and that “judicial review of rules issued is available.” *Id.* at 10. “The economic burdens that may be imposed as a result of this legislation are not substantial particularly when considered in the context of the economic, health, and other benefits.” *Id.* at 12.

C. Regulatory Background

The Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601, *et seq.*, provides the EPA the statutory authority to regulate PCBs. TSCA Section 6(e), 15 U.S.C. § 2605(e), directs the Administrator of EPA to promulgate rules that address the manufacturing, processing, distribution in commerce, use, and disposal of PCBs. On February 17, 1978, the EPA published rules concerning the marking and disposal of PCBs. These rules were codified at 40 C.F.R. Part 761 and became effective April 18, 1978, and these regulations have been revised and amended over time. One such amendment was the national registration requirement for PCB Transformers published on June 29, 1998.

1. Key Definitions

Definitions of relevant terms are set forth at TSCA Section 3, 15 U.S.C. Section 2602, and 40 C.F.R. Section 761.3. The following are significant to this litigation:

Administrator means the Administrator of the Environmental Protection Agency. TSCA § 3(1), 15 U.S.C. 2602(1); 40 C.F.R. § 761.3.

Distribute in commerce and **distribution in commerce** when used to describe an action taken with respect to a chemical substance or mixture or article containing a substance or mixture mean to sell, or the sale of, the substance, mixture, or article in commerce; to introduce or deliver for introduction into commerce, or the introduction or delivery for introduction into commerce of, the substance, mixture, or article; or to hold, or the holding of, the substance, mixture, or article after its introduction into commerce. TSCA § 3(4), 15 U.S.C. 2602(4); 40 C.F.R. § 761.3.

Environment includes water, air, and land and the interrelationship which exists among and between water, air, and land and all living things. TSCA § 3(5), 15 U.S.C. § 2602(5).

Excluded PCB products means PCB materials which appear at concentrations less than 50 parts per million ("ppm"). 40 C.F.R. § 761.3.

Leak or **leaking** means any instance in which a PCB Article, PCB Container, or PCB Equipment has any PCBs on any portion of its external surface. 40 C.F.R. § 761.3.

Liquid PCBs means a homogenous flowable material containing PCBs and no more than 0.5 percent by weight non-dissolved material. 40 C.F.R. § 761.3.

Manifest means the shipping document EPA form 8700-22 and any continuation sheet attached to EPA form 8700-22, originated and signed by the generator of PCB waste in accordance with the instructions included with the form and subpart K of this part. 40 C.F.R. § 761.3.

Mark means the descriptive name, instructions, cautions, or other information applied to PCBs and PCB Items, or other objects subject to these regulations. 40 C.F.R. § 761.3.

Marked means the marking of PCB Items and PCB storage areas and transport vehicles by means of applying a legible mark by painting, fixation of an adhesive label, or by any other method that meets the requirements of these regulations. 40 C.F.R. § 761.3.

Mineral Oil PCB Transformer means any transformer originally designed to contain mineral oil as the dielectric fluid and which has been tested and found to contain 500 ppm or greater PCBs. 40 C.F.R. § 761.3.

Non-PCB Transformer means any transformer that contains less than 50 ppm PCB; except that any transformer that has been converted from a PCB Transformer or a PCB-Contaminated transformer cannot be classified as a non-PCB Transformer until reclassification has occurred, in accordance with the requirements of § 761.30(a)(2)(v). 40 C.F.R. § 761.3.

PCB and PCBs means any chemical substance that is limited to the biphenyl molecule that has been chlorinated to varying degrees or any combination of substances which contains such substance. Refer to § 761.1(b) for applicable concentrations of PCBs. 40 C.F.R. § 761.3.

PCB Article means any manufactured article, other than a PCB Container, that contains PCBs and whose surface(s) has been in direct contact with PCBs. PCB Article includes . . . transformers. 40 C.F.R. § 761.3.

PCB-Contaminated means a non-liquid material containing PCBs at concentrations ≥ 50 ppm but < 500 ppm; a liquid material containing PCBs at concentrations ≥ 50 ppm but < 500 ppm or where insufficient liquid material is available for analysis, a non-porous surface having a surface concentration > 10 $\mu\text{g}/100$ cm^2 but < 100 $\mu\text{g}/100$ cm^2 , measured by a standard wipe test as defined in § 761.123. 40 C.F.R. § 761.3.

PCB Item means any PCB Article, PCB Article Container, PCB Container, PCB Equipment, or anything that deliberately or unintentionally contains or has as a part of it any PCB or PCBs. 40 C.F.R. § 761.3.

PCB Transformer means any transformer that contains ≥ 500 ppm PCBs. For PCB concentration assumptions applicable to transformers containing 1.36 kilograms (kg) (3 pounds (lbs.)) or more of fluid other than mineral oil, see § 761.2. For provisions permitting reclassification of electrical equipment, including PCB Transformers, containing ≥ 500 ppm PCBs to PCB-Contaminated Electrical Equipment, see § 761.30(a) and (h). 40 C.F.R. § 761.3.

Person means any natural or judicial person including any individual, corporation, partnership, or association; any State or political subdivision thereof; any interstate body; and any department, agency, or instrumentality of the Federal Government. 40 C.F.R. § 761.3.

Retrofill means to remove PCB or PCB-contaminated dielectric fluid and to replace it with either PCB, PCB-contaminated, or non-PCB dielectric fluid. 40 C.F.R. § 761.3.

Totally enclosed manner means any manner that will ensure no exposure of human beings or the environment to any concentration of PCBs. TSCA §

6(e)(2)(C), 15 U.S.C. 2605(e)(2)(C); 40 C.F.R. § 761.3.

2. PCB Concentration Assumptions for Use

EPA's PCB regulations outline assumptions which may be made regarding the PCB concentrations in electrical equipment. The pertinent sections are as follows:

(a)(1) Any person may assume that transformers with < 3 pounds (1.36 kilograms (kgs)) of fluid . . . contain PCBs at < 50 ppm.

(2) Any person must assume that mineral oil-filled electrical equipment that was manufactured before July 2, 1979, and whose PCB concentration is not established is PCB-Contaminated Electrical Equipment (i.e., contains ≥ 50 ppm PCB, but < 500 ppm PCB). . . . Any person may assume that electrical equipment manufactured after July 2, 1979, is non-PCB (i.e., < 50 ppm PCBs). If the date of manufacture of mineral oil-filled electrical equipment is unknown, any person must assume it to be PCB-Contaminated.

(3) Any person must assume that a transformer manufactured prior to July 2, 1979, that contains 1.36 kg (3 pounds) or more of fluid other than mineral oil and whose PCB concentration is not established, is a PCB Transformer (i.e., ≥ 500 ppm). If the date of manufacture and the type of dielectric fluid are unknown, any person must assume the transformer to be a PCB Transformer.

...
(b) PCB concentration may be established by:

(1) Testing the equipment; or

(2)(i) A permanent label, mark, or other documentation from the manufacturer of the equipment indicating its PCB concentration at the time of manufacture; and

(ii) Service records or other documentation indicating the PCB concentration of all fluids used in servicing the equipment since it was first manufactured.

40 C.F.R. § 761.2.

3. Prohibitions

The regulatory section relating to the manufacturing, processing, distribution in commerce, and use of PCBs and PCB Items contains the following prohibitions on PCB use:

Except as authorized in § 761.30, the activities listed in paragraphs (a) and (d) of this section are prohibited pursuant to section 6(e)(2) of TSCA.

...

(a) No persons 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 § 761.30.

40 C.F.R. § 761.20.

The “use” of PCB transformers is not considered use in a totally enclosed manner, regardless of whether the transformer is intact or non-leaking. See 40 C.F.R. § 761.20. Section 761.20 classifies the “distribution in commerce” of intact, non-leaking transformers that contain PCBs at any concentration as a totally enclosed manner, but not the “use” of PCB transformers. *Id.* As noted by the Environmental Appeals Board:

EPA originally defined the use of PCBs in non-leaking transformers as “totally enclosed” and therefore not subject to the PCB ban at TSCA section 6(e)(2)(A). 44 Fed. Reg. 31,514, 31,549 (May 31, 1979). EPA’s determination regarding the use of PCBs in transformers was challenged in *Environmental Defense Fund v. EPA*, 636 F.2d 1267 (D.C. Cir. 1980). The court found that the rulemaking record lacked substantial evidence to support EPA’s “totally enclosed” determination and therefore set aside the Agency’s original rule. *Id.* at 1286. On remand, EPA “decided that no electrical equipment uses [including transformers] should be categorized as use in a totally enclosed manner.” 47 Fed. Reg. 37,342, 37,344 (Aug. 25, 1982). EPA then removed the “totally enclosed” determination pertaining to PCB transformer use from the PCB regulations. See *id.* at 37,357.

In re Lazarus, 7 E.A.D. 318, 369-70 n.90 (1997).

4. Use Authorization

Pursuant to section 6(e)(2)(B) of TSCA, in June 1998 the EPA authorized non-totally enclosed PCB activities, subject to the regulatory requirements below:

(a) Use in and servicing of transformers (other than railroad transformers). PCBs at any concentration may be used in transformers (other than in railroad locomotives and self-propelled railroad cars) and may be used for purposes of servicing including rebuilding these transformers for the remainder of their useful

lives,³ subject to the following conditions:

(1) Use conditions.

...
 (vi)(A) No later than December 28, 1998 all owners of PCB Transformers, including those in storage for reuse, must register their transformers with the Environmental Protection Agency, National Program Chemicals Division, Office of Pollution Prevention and Toxics (7404), 1200 Pennsylvania Ave., NW., Washington, DC 20460. This registration requirement is subject to the limitations in paragraph (a)(1) of this section.

(1) A transformer owner who assumes a transformer is a PCB-Contaminated transformer, and discovers after December 28, 1998 that it is a PCB-Transformer, must register the newly-identified PCB Transformer, in writing, with the Environmental Protection Agency no later than 30 days after it is identified as such. This requirement does not apply to transformer owners who have previously registered with the EPA PCB Transformers located at the same address as the transformer that they assumed to be PCB-Contaminated and later determined to be a PCB Transformer.

(2) A person who takes possession of a PCB Transformer after December 28, 1998 is not required to register or re-register the transformer with the EPA.

(B) Any person submitting a registration under this section must include:

- (1) Company name and address.
- (2) Contact name and telephone number.
- (3) Address where these transformers are located. . . .
- (4) Number of PCB Transformers and the total weight in kilograms of PCBs contained in the transformers.
- (5) Whether any transformers at this location contain flammable dielectric fluid (optional).
- (6) Signature of the owner, operator, or other authorized representative certifying the accuracy of the information submitted.

(C) A transformer owner must retain a record of each PCB Transformer's registration (e.g., a copy of the registration and the return receipt signed by EPA) with the inspection and maintenance records required for each PCB Transformer under paragraph (a)(1)(xii)(I) of this section.

(D) A transformer owner must comply with all requirements of paragraph (a)(1)(vi)(A) of this section to continue the PCB-Transformer's authorization for

³

The average service life of transformers is about 40 years, if routine maintenance is performed. See 42. Fed. Reg. 22564, 22564 (May 24, 1977); Microeconomic Impacts of the Proposed "PCB Ban Regulation." EPA 560/6-77-035, pages 7-8 (May 16, 1978), available online at <http://www.epa.gov/nscep/>.

use, or storage for reuse, pursuant to this section and TSCA section 6(e)(2)(B).

40 C.F.R. § 761.30(a)(1)(vi) (emphasis added).

The preamble to the final rule discussed the requirement for PCB Transformer registration as it relates to use authorizations:

Today, as a condition of the authorization for continued use, EPA is finalizing a national registration requirement for PCB Transformers at § 761.30(a)(1)(vi). This new registration requirement extends to PCB Transformers in use or in storage for reuse, even if a specific PCB Transformer was registered under the old requirements at § 761.30(a)(1)(vi). . . . PCB Transformers that are not registered are not authorized for use and must be disposed of.

63 Fed. Reg. 35384, 35394 (June 29, 1998) (emphasis added).

The proposed rule published on December 6, 1994 had similar language signifying that the proposed registration was to be required for maintaining use authorization:

The registration requirements proposed today would extend to all PCB Transformers in use or in storage for reuse, even if a specific PCB Transformer was registered under the current requirements at § 761.30(a)(1) [i.e., the fire department registration requirement]. Under proposed § 761.30(a)(1)(vii)(C), this requirement would be a part of the authorization for continued use for each PCB Transformer.

59 Fed. Reg. 62788, 62838 (December 6, 1994) (emphasis added).

Several reasons were listed for the change from the prior fire department registration requirement to the new national registration requirement. Wide-scale non-compliance with the fire department registration rule was part of the impetus for improving the registration system. A national registration and PCB Transformer database would allow Federal, State and local emergency response personnel to have information about the location of PCB Transformers for emergency planning and

preparedness purposes.

A review of the regulated community's compliance with these registration requirements by the Office of the Inspector General of EPA and EPA Regional personnel found that 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. In addition, many owners could not demonstrate that they had registered their transformers as required in order to continue each unit's authorization for use.

...
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.

Therefore, in response to ... the Inspector General's report documenting a lack of compliance with the existing regulation, EPA proposed to amend § 761.30(a)(1)(vii) [the fire department rule] to require all owners of PCB Transformers to register their transformers with EPA.

63 Fed. Reg. 35384, 35393 (June 29, 1998). The EPA viewed the national registration requirement as an improvement on the fire department registration requirement and cited several reasons:

EPA believes that the national registration program provides benefits that merely improving the enforcement of the existing fire rules cannot provide. For example, collecting the information nationally, in one data base, 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. In addition, the new registration program is designed to cure features of the existing rule that impede enforcement. For instance, the existing rule does not require transformer owners to maintain records documenting that they complied with the rule. An inspector who is not sure, based on the evidence available at an inspection, whether or not registration with the fire department occurred, must determine which fire department is the primary responder for that facility and impose on it to determine if registration, in fact, occurred. The new rule requires the transformer owner to maintain, with the annual log, proof that registration occurred. If that documentation is absent, not only is there a violation, but the inspector will easily be able to double check the national data base to determine if the registration in fact occurred.

...
In addition, changes to the rule that will make it easier to enforce, such as requiring that proof of registration be kept with the annual log, should assist in abating the risk from fires involving PCBs by increasing the rate of compliance, therefore providing emergency response personnel with information about more PCB Transformers.

Id. at 35394. A national assessment of PCB quantities in use was also necessary for international deliberations on a mandatory ban on PCB use:

Since EPA proposed the transformer registration program in 1994, PCBs have taken on increasing importance in international negotiations regarding hazardous substances. For example, negotiations are ongoing to develop a legally binding Protocol on Persistent Organic Pollutants under the United Nations Economic Commission for Europe's Convention on Long Range Transboundary Air Pollution. In those negotiations, several European countries support a mandatory ban on PCB use to comply with a European Community Directive banning PCB use by 2010. However, having a national data base of the amounts of PCBs in transformers (the largest single source of liquid PCBs) will allow EPA to evaluate more accurately the impact of such proposals on the American economy.

Id. at 35394.

III. STATEMENT OF FACTS

The following facts have been established through admissions made by Respondent in its Answer; during the EPA inspection on May 7, 2009; in its PCB Transformer Registration, dated April 5, 2005; and, in the Scott Testing Transformer Maintenance and Repair Report ("Scott Testing Report"), dated July 13, 2004, provided to the EPA by Respondent. Unless specifically otherwise noted, all of the following facts concern times relevant to the matters alleged in the Complaint.

A. **Background**

Respondent, The Okonite Company, Inc. ("Okonite"), has its principal place of business at 102 Hilltop Road, Ramsey, New Jersey 07446 ("102 Hilltop Road" or

“Ramsey location”). (Complaint ¶ 5 and Answer.) Okonite owns and operates an office building and a utility building at 102 Hilltop Road. (Complaint and Answer, ¶¶ 4 and 5.) Okonite is incorporated under the laws of the State of New Jersey, and therefore is a “person” within the meaning of 40 C.F.R. Section 761.3. (Complaint and Answer, ¶ 6.) Okonite has been in business since 1878. (Complainant’s Exhibit 1.) Okonite owns and uses two transformers containing PCBs, and continues to own and use said transformers. (Complaint and Answer, ¶ 7.) The Ramsey location was built by Okonite in 1969, and the two transformers have been at the Ramsey location since it was first constructed. (Complainant’s Exhibit 1.) One transformer is in use at the office building and the other transformer is in use at the utility building at 102 Hilltop Road. (Complaint and Answer, ¶ 7.) Nameplate data for the office building transformer indicated that the transformer contained 5655 pounds of fluid. (Scott Testing Report, Inspection Report, page 2 of 3.) Nameplate data for the utility building transformer indicated that the transformer contained 4086 pounds of fluid. (Scott Testing Report, Inspection Report, page 3 of 3.) Both transformers are filled with “non-flammable liquid.” (Complainant’s Exhibit 1.) According to Respondent’s PCB Transformer Registration, the two transformers contain 4,082.4 kilograms (kg) total weight of PCBs. (PCB Transformer Registration, section 2.b.) Each of the two aforementioned transformers is a “PCB Transformer” as defined in the PCB regulations. (Complaint and Answer, ¶¶ 15 and 24.) Transformers that contain PCBs are PCB Articles, and PCB Articles are PCB Items. See 40 C.F.R. § 761.3. Therefore, 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. (Complaint and Answer, ¶ 8.)

Use of any PCB or PCB Item is prohibited pursuant to section 6(e)(2) of TSCA, unless authorized by EPA under 40 C.F.R. Section 761.30. (40 C.F.R. § 761.20; see Complaint and Answer, ¶¶ 11 and 20.) No later than December 28, 1998, all owners of PCB Transformers were required to register their transformers with EPA. (Complaint and Answer, ¶¶ 12 and 21.) On April 5, 2005, Respondent registered the two PCB Transformers located at 102 Hilltop Road with the EPA. (Complaint and Answer, ¶¶ 16 and 25.) Respondent did not maintain compliance with the PCB Transformer regulations, such as marking, inspection and record keeping, prior to April 2005 when transformers were registered. (Respondent's Prehearing Exchange, page 7.)

On May 7, 2009, representatives of the EPA conducted an inspection of and at Respondent's place of business at 102 Hilltop Road. (Complaint and Answer, ¶ 9.) On December 3, 2009, the EPA served Respondent with a Complaint with allegations pertaining to Respondent's unauthorized use of the two PCB transformers.

B. Respondent's Admitted Failure to Timely Register its PCB Transformers

No later than December 28, 1998, all owners of PCB Transformers must register their transformers with the EPA. Respondent's status as the owner of two PCB Transformers and its use of the two PCB Transformers that were subject to the PCB regulations are established by Respondent's Answer to the Complaint. Respondent's purported registration form is dated April 5, 2005, more than six (6) years after the deadline for required notification to the EPA. Respondent also admits that it did not

maintain compliance with the PCB Transformer regulations, such as marking, inspection and record keeping, prior to April 2005. Respondent has conceded that it did not attempt to register the two PCB Transformers with the EPA until April 5, 2005, more than 6 years after the December 28, 1998 registration deadline. Therefore, Respondent is in violation of the requirement to register no later than December 28, 1998, found at 40 C.F.R. Section 761.30(a)(1)(vi)(A), to retain the authorization to use the PCB Transformers.

C. Respondent Admits Unauthorized Use of PCB Transformers After 1998

No persons may use any PCB or any PCB Item in any manner other than in a totally enclosed manner within the United States unless authorized under 40 C.F.R. Section 761.30. 40 C.F.R. § 761.20. Registration of PCB Transformers with the EPA no later than December 28, 1998 was a requirement for the continued use of the PCB Transformers. 40 C.F.R. Section 761.30(a)(1)(vi)(A) and (D). Respondent in its Answer states that it continues to use the PCB Transformers in question. Respondent in its Answer admitted that it did not attempt to register the two PCB Transformers with the EPA until April 5, 2005, which failed to meet the December 28, 1998 deadline. Therefore, Respondent's use of the PCB Transformers is not authorized under 40 C.F.R. Section 761.30 and prohibited pursuant to section 6(e)(2) of TSCA.

V. ARGUMENT

PCB Transformers had to be registered by December 28, 1998, pursuant to 40 CFR § 761.30(a)(1)(vi)(A). Use of unregistered PCB Transformers after the deadline constitutes an unauthorized use of PCBs, in violation of TSCA Section 6(e)(2) and 40

C.F.R. Sections 761.20 and 761.30(a)(1)(vi)(D). Failure to meet the requirements for use authorization means the PCB ban in TSCA Section 6(e)(2) applies and the PCB Transformers must be removed from service and properly disposed of or converted to non-PCB Transformers.

A. Respondent's PCB Transformers Were Identifiable in 1998 and Should Have Been Registered with the EPA

On June 29, 1998, the PCB regulations were amended to include the provision that "[a]ny person must assume that a transformer manufactured prior to July 2, 1979, that contains 1.36 kg (3 pounds) or more of fluid other than mineral oil and whose PCB concentration is not established, is a PCB Transformer. If the date of manufacture and the type of dielectric fluid are unknown, any person must assume the transformer to be a PCB Transformer." 40 CFR 761.2(a)(3). During the EPA inspection, representatives for Okonite stated that the transformers had been in place since the facility was constructed in approximately 1969. (Complainant's Exhibit 1.) Although the nameplates on these transformers do not indicate specific dates of manufacture, it is obvious that the transformers were manufactured prior to July 2, 1979, since they were in place at the Okonite facility prior to that date, i.e., in 1969 when the facility was constructed. Nameplate data for the office building transformer indicated that the transformer contained 5655 pounds of fluid. (Scott Testing Report, Inspection Report, page 2 of 3.) Nameplate data for the utility building transformer indicated that the transformer contained 4086 pounds of fluid. (Scott Testing Report, Inspection Report, page 3 of 3.) Both transformers are filled with "non-flammable liquid." (Complainant's Exhibit 1.) These transformers, since they were manufactured prior to 1979 and each

contains more than 1.36 kg (3 pounds) of fluid other than mineral oil, were required to be treated as PCB Transformers in accordance with the regulations.

Assumptions regarding PCB concentration in electrical equipment are delineated in the regulations. 40 C.F.R. § 761.2. If the date of manufacture and the type of dielectric fluid are unknown, the user had to assume the transformer was a PCB Transformer. *Id.* The PCB concentration assumptions have long been in existence. The preamble to the May 31, 1979 Federal Register described the PCB concentration assumptions for transformers. It was stated therein that “[a] transformer must be assumed to be a PCB Transformer if any one of the following conditions exist: (1) the nameplate indicates that the transformer contains PCB dielectric fluid; (2) the owner or operator has any reason to believe that the transformer contains PCB dielectric fluid.” 44 Fed. Reg. 31514, 31517 (1979) (emphasis added). In regard to provision (1), above, it is EPA’s position that the nameplates did, in fact, indicate that the transformers contained PCB dielectric fluid. The name “non flammable liquid” has been included in many available lists of PCB dielectric fluid names, including the EPA’s 1994 PCB Question & Answer Manual which was prepared to answer questions from the regulated community and was readily available to the public. (Complainant’s Exhibit 12, page i). In regard to provision (2), above, it is EPA’s position that, since the weight of the dielectric fluid indicated on the nameplate was approximately 13 pounds per gallon,⁴ the owner had reason to believe that the transformer contains PCB dielectric fluid. EPA’s 1994 PCB Question & Answer Manual states that “PCBs are chemical mixtures

⁴ Based on the nameplates, the main building transformer contained 435 gallons of fluid weighing 5655 lbs. (13 lbs./gal) and the utility building transformer contained 315 gallons weighing 4086 lbs. (13 lbs./gal).

containing many different PCB congeners. They have a heavy, liquid, oil-like consistency, and weigh 10 to 15 pounds per gallon." (Complainant's Exhibit 12, page i.) Additionally, EPA's 1990 PCB Penalty Policy states that "[f]or converting volume to weight, the Agency assumes the average density of PCB liquid to be approximately 12 lbs per gallon." (Complainant's Exhibit 5, page 7, Converting Volume to Weight; Notice of Availability of Polychlorinated Biphenyl Penalty Policy, 55 Fed. Reg. 13955 (April 13, 1990).)

For all these reasons, Respondent should have known that it had to register its PCB Transformers with the EPA no later than December 28, 1998.

B. EPA's Inspection Confirmed the Unauthorized Use Violations For Respondent's PCB Transformers

Information gained during the EPA inspection was critical to the determination of the violation and to development of the enforcement action. Most importantly, during the inspection, the EPA inspectors:

1) verified the presence of PCB Transformers. When EPA inspectors first noted an entry in the PCB Transformer database for this site, it was suspected that the entry may have been made in error. This location of the transformers was the headquarters office for Okonite. PCB Transformers are typically found at industrial locations. The first goal of the inspection was to verify whether PCB Transformers were, in fact, present at this location. During the inspection, EPA confirmed that two PCB Transformers were indeed present at this facility; and,

2) verified the nameplate status of the transformers. PCB Transformers may be

(Scott Testing Report.)

“nameplate PCB Transformers” (a commonly used term for transformers that were manufactured using PCB fluid and whose nameplate identifies them as containing PCB fluid (this fluid has PCBs in concentrations well above 500 ppm, typically 30-70% PCBs which corresponds to 300,000-700,000 ppm PCBs)), or PCB Transformers may be other transformers that simply contain, through design, manufacture or maintenance, PCBs over 500 ppm. The PCB regulations at 40 CFR Section 761.30 (a)(1)(vi)(A)(1) provide a narrow exception to the December 28, 1998 registration deadline: a transformer owner who assumed a transformer was a PCB-contaminated transformer and discovers that it is a PCB-Transformer (PCB concentration over 500 ppm) must register the “newly identified PCB Transformer” with EPA no later than 30 days after it is identified as a PCB Transformer. Consistent with this, a transformer owner who assumes a mineral oil-filled transformer is a PCB-Contaminated (PCB concentration over 50 ppm and less than 500 ppm) transformer based on nameplate information and discovers after December 28, 1998 through testing that it is a PCB Transformer may register the “newly-identified PCB Transformer” within 30 days of its identification. 40 CFR § 761.30 (a)(1)(vi)(A)(1). Another goal of EPA’s inspection was to examine the nameplates on the transformers to see if the information on the nameplates should have alerted the Respondent that the transformers contained over 500 ppm. During the inspection, EPA inspectors learned that the PCB Transformers were “nameplate PCB Transformers. (Complainant’s Exhibit 1.) In other words, the information in the nameplates should have alerted the Respondent that the transformers were PCB Transformers that had to be registered no later than December 28, 1998.

As additional verification of the PCB status of the transformers (i.e., PCB concentration over 500 ppm), the EPA inspectors obtained a copy of an analysis conducted in July 2004 by Scott Testing on behalf of Respondent which documented that the transformers contained well over 500 ppm PCBs. (Scott Testing Report, Weidmann Analyses). The main building PCB Transformer contains 597,000 ppm PCB and the utility building PCB Transformer contains 603,000 ppm PCB. *Id.* Even if Respondent claims that the PCB Transformers were newly-discovered, the PCB Transformer Registration, dated April 5, 2005, was filed with the EPA well beyond 30 days after the analysis of the transformers provided in the Scott Testing Report, dated July 13, 2004, had identified them as PCB Transformers.

C. Respondent is Strictly Liable for Violations under TSCA

TSCA is a strict liability statute; therefore, lack of intent to violate its requirements is not a defense to the allegations. *In re Strandley*, 3 E.A.D. 718, 1991 WL 284616, at 2 (1991) (citing 15 U.S.C. § 2614). Under TSCA, failure to comply with regulations promulgated under authority of the Act and failure to submit reports required by such regulations are unlawful. TSCA § 15, 15 U.S.C. § 2614. The Congressional ban on PCB use went into effect one year after January 1, 1977, subject to uses authorized by EPA rule. TSCA § 6(e)(2)(a), 15 U.S.C. § 2605(e)(2)(a).

“Federal law often imposes liability upon corporations or corporate officers for nonfeasance in public health and welfare situations.” *In re Green Thumb Nursery*, 6 E.A.D. 782, 796 (1997). “Environmental statutes are intended to be action forcing, and

brook no excuse for failure to achieve the required result.” *Id.* Respondent failed to meet the 1998 EPA use authorization requirements when it failed to timely register its PCB Transformers. Therefore, the PCB ban applies to Respondent’s PCB Transformers and Respondent is liable for the violations.

D. The Unauthorized Use Violation Continues Until PCB Transformers are Removed From Service or Reclassified

Both Complainant and Respondent contend that the unauthorized use for failure to register PCB Transformers is a continuing violation, but differ in opinion as to whether the violation has ceased or can be “cured.” Respondent asserts that the unauthorized use ended with the submission of a PCB Transformer Registration form on April 5, 2005. Complainant maintains that failure to register PCB Transformers no later than December 28, 1998 removes those units from the scope of the use authorization rule such that continuing to use them after that date results in a continuing violation that does not cease until the PCB Transformers are either removed from service or successfully reclassified in accordance with the regulations.⁵ There is no opportunity to register a PCB Transformer “late;”⁶ failure to comply with the deadline, and continued use of the PCB Transformer after the deadline passed constitutes ongoing and unauthorized use of PCBs in violation of the PCB ban.

⁵ PCB Transformers may be reclassified to a PCB-Contaminated Transformer or a non-PCB transformer by removing the PCB dielectric fluid and refilling the transformer. 40 C.F.R. § 761.30(a)(2)(v).

⁶ An exception, which does not apply to the present Okonite matter, is for new-discovered PCB Transformers.

1. The 1985 and 1998 Registration Requirements

In re Lazarus, 7 E.A.D. 318 (1997), was decided by EPA's Environmental Appeals Board ("EAB") based on the then-existing PCB Transformer registration requirements. The 1985 registration requirement read as follows:

As of December 1, 1985, all PCB Transformers * * * must be registered with fire response personnel with primary jurisdiction (that is the fire department or fire brigade which would normally be called upon for the initial response to a fire involving the equipment). 40 C.F.R. § 761.30(a)(1)(vi).

Id.; 50 Fed. Reg. 29170, 29200 (July 17, 1985) (emphasis added).

The language of the regulation at issue in this Okonite matter differs from the regulation discussed in *Lazarus*. The current regulation reads as follows:

No later than December 28, 1998 all owners of PCB Transformers, including those in storage for reuse, must register their transformers with the Environmental Protection Agency, National Program Chemicals Division, Office of Pollution Prevention and Toxics (7404), 401 M St., SW., Washington, DC 20460. This registration requirement is subject to the limitations in paragraph (a)(1) of this section.

40 C.F.R. § 761.30(a)(1)(vi)(A); 63 Fed. Reg. 35384, 35440 (June 29, 1998) (emphasis added). The current registration requirement is a condition of continued authorized use:

A transformer owner must comply with all requirements of paragraph (a)(1)(vi)(A) of this section to continue the PCB-Transformer's authorization for use, or storage for reuse, pursuant to this section and TSCA section 6(e)(2)(B).

40 C.F.R. § 761.30(a)(1)(vi)(D); 63 Fed. Reg. 35384, 35440 (June 29, 1998).

2. *In re Lazarus*

The analysis performed by the Court in *Lazarus* involved the 1985 requirement that called for the registration of PCB Transformers "As of December 1, 1985." 7 E.A.D.

at 367. Whether the statute of limitations barred an action for penalties for failure to register PCB transformers with fire department personnel was one focus in this case. *Id.* *Lazarus* addressed the general statute of limitations, the doctrine of continuing violations, and the special accrual rule as these related to actions for penalty. *Id.* at 364. The general five-year statute of limitations on civil penalty actions at 28 U.S.C. § 2462 applies to TSCA administrative enforcement actions, which bars action for penalties after the limitations period has expired. *Id.* The limitations period begins to run when a violation first accrues; however, the “doctrine of continuing violations” provides a special rule for determining when a violation first accrues. *Id.* Under the “special accrual rule,” the limitations period for continuing violations does not begin to run until an illegal course of conduct is complete. *Id.* The EAB in *Lazarus* concluded that if the doctrine of continuing violations applies to any of the counts at issue, then an action for civil penalties may be initiated during the period of continuing violations and up to five years after the violations have ceased. *Id.* at 365.

In assessing the “precedent interpreting and applying the continuing violation doctrine in the statute of limitations context,” the EAB in *Lazarus* noted that courts “may take into consideration the purpose of an underlying remedial statute” or “intent of Congress embodied in the Act” in determining whether a particular “obligation” or “prohibition” is continuing in nature. *Id.* at 365-66. The Court also stated that “an agency’s interpretation regarding the continuing nature of requirements may receive deference in a court’s determination of whether to apply the continuing violations doctrine to the statute of limitations.” *Id.* “The regulations are especially relevant where

the substance of a requirement is found in the regulation rather than the statute.” *Id.* at 366. “Words and phrases connoting continuity and descriptions of activities that are typically ongoing are indications of a continuing nature.” *Id.* This was contrasted to “requirements that must be fulfilled within a particular time frame.” *Id.* (citing *Toussie v. United States*, 397 U.S. 112 (1970) (continuing duty to register for the draft for men between the ages of 18 and 26; prosecution timely if indictment returned before defendant becomes 31)).

In determining whether the regulatory requirement at issue was continuing in nature for statute of limitation purposes, the EAB in *Lazarus* took into consideration the relevant statutory language, legislative history, the preamble to the regulations, and the language of the regulatory text. *Id.* at 368-72. Evidence that Congress contemplated the possibility of continuing violations of TSCA was reflected in the penalty section which states that “each day a violation continues shall constitute a separate violation.” *Id.* at 368. The transformer registration requirement is premised on TSCA’s broad statutory prohibition on the use of PCBs (the “PCB ban”) found at TSCA Section 6(e). *Id.* “The statutory prohibition clearly evidences an intent to institute a PCB ban beginning on the first day of 1978 and to continue the ban every day thereafter.” *Id.* The decision cited Congressional debates on TSCA section 6(e) that identified PCB as a “mad dog” and “known bad actor” and stated that “the time has arrived to get rid of it.” *Id.* at 369 (citing 122 Cong. Rec. 27,186 (1976) (statement of Rep. Gude)). Exceptions to the statutory prohibition are limited to those authorized by the EPA. *Id.*; TSCA § 6(e)(2)(B), 15 U.S.C. § 2605(e)(2)(B). “The overall statutory construction, combining a

broad prohibition (i.e., the ban) with exceptions (i.e., use authorizations) that must be supported by a required statutory finding, is a strong indication that the only PCB uses permitted after January 1, 1978, are those that comply with the use authorization regulations.” *Id.* Unless the conditions for the transformer use authorization are complied with, the use authorization is inapplicable. If a use authorization is inapplicable, the PCB ban applies. *Id.* at 370. The EAB also noted that the EPA reached the same conclusion in the preamble to the final rule. *Id.* Lazarus concluded that because the PCB ban was intended to be permanent, the conditions of the use authorization, including restrictions on use, had to be continuing obligations as well in order to effectively implement the permanent ban. *Id.* at 370-72.

Lazarus examined the December 1, 1985 transformer registration regulation and decided that the date did not limit the applicability of the regulation to a particular time frame, but was simply an “effective date” for the registration requirement. *Id.* at 372. The regulatory text required that “as of” this date transformers must be registered. *Id.* *Lazarus* found that “the requirement to register PCB transformers with fire response personnel is continuing in nature and supports a continuing violation. By failing to register the PCB transformers, *Lazarus* was not using its transformers in accordance with the conditions of the use authorization.” *Id.* The action for penalty, which only sought a single penalty,⁷ for “failure to register the transformers” was filed within the five-year limitations period after the violation ceased on the date which the transformers

⁷ *Lazarus* noted that penalty assessed in the Complaint reflected a single day penalty. The EPA did not seek to assess multiple day penalties despite the authority to do so pursuant to TSCA section 16(a)(1). 7 E.A.D. at 372 n. 94.

were registered.⁸ *Id.*

3. Analysis of the 1998 Registration Requirement

Determining whether the violation of a use authorization is continuing in nature involves an analysis of the relevant statutory language, legislative history, the preamble to the regulations, and the language in the regulatory text. As in the *Lazarus* case, TSCA's statutory prohibition still institutes a PCB ban beginning on the first day of 1978 and the ban continues every day thereafter. TSCA § 6(e)(2)(A), 15 U.S.C. § 2605(e)(2)(A). Each day a violation continues constitutes a separate violation. TSCA § 16(a)(1), 15 U.S.C. § 2615(a)(1). Both of these statutory provisions imply that unauthorized use of PCBs would be continuing in nature.

Included in the legislative history for TSCA was the recognition of a need for authority to "control the introduction of harmful substances into the environment before damage to health or the environment occurs." S. Rep. No. 94-698, at 46 (Views of Rep. Baker). TSCA was intended to remedy the inadequacies in the existing authorities and allow the EPA to regulate the avenues through which the environment is exposed to PCBs. H. Rep. 94-1341 (Interstate and Foreign Commerce Committee), at 6 (1976).

Examining the preamble to the current regulation and the language of the regulatory text is essentially a form of regulatory interpretation. The EAB has explained that for "administrative regulation, the normal tenets of statutory construction are generally applied." *In re Howmet*, 13 E.A.D. 272, 282 (2007), *aff'd*, 614 F.3d 544 (D.C.

⁸ Respondent asserts that since it filed a registration on April 5, 2004, the EPA's December 3, 2009 Complaint was untimely under *Lazarus*. However, *Lazarus* found the doctrine of continuing violations applied to failure to register with the fire department and allowed a penalty action filed within 5 years after PCB Transformer registration. 7 E.A.D. at 372.

Cir. 2010). "The plain meaning of words is ordinarily the guide to the definition of a regulatory term." *Id.* The regulation interpretation must harmonize with and further, and not to conflict with, the objective of the statute it implements. *Id.* Regulatory history, such as preamble statements, assists in regulatory interpretation. *Id.* Greater deference is given to a position when it is supported by Agency rulings, statements, and opinions that have been consistent over time. *Lazarus*, 7 E.A.D. at 352-53. However, "[c]hange in an agency position, however, is not necessarily fatal as long as the change is neither "arbitrary, capricious or an abuse of discretion." *Id.* at 353 (citing *Smiley v. Citibank*, 517 U.S. 735, 742 (1996)).

The current regulation requires registration of PCB Transformers "No later than December 28, 1998" as part of the requirements for "use authorizations." 40 C.F.R. § 761.30(a)(1)(vi). Failure to comply with any condition of PCB Transformer use authorization means the use authorization is inapplicable, and therefore the TSCA Section 6 PCB ban applies. 40 C.F.R. § 761.20; see *Lazarus*, 7 E.A.D. at 370. The plain meaning of words "No later than" is that the December 28, 1998 date is a cutoff date for registration of transformers in use that were identifiable as or assumed to be PCB Transformers. See 40 C.F.R. § 761.30(a)(1)(vi)(A) and (D). Registration forms received after the December 28, 1998 deadline do not meet the requirement to register "No later than" December 28, 1998. 40 C.F.R. § 761.30(a)(1)(vi)(A) and (D). An exception was for newly-discovered PCB Transformers provided they were registered within 30 days of identification. 40 C.F.R. § 761.30(a)(1)(vi)(A)(1). The preamble to the final rule advised the regulated community that the national registration requirement for

PCB Transformers was a “condition of the authorization for continued use” and that “PCB Transformers that are not registered are not authorized for use and must be disposed of.” 63 Fed. Reg. 35384, 35394 (June 29, 1998). Also, the 1994 preamble to the proposed rule advised the regulated community that “this requirement would be a part of the authorization for continued use for each PCB Transformer.” 59 Fed. Reg. 62788, 62838 (December 6, 1994).

By contrast, the language of the fire department registration rule analyzed in *Lazarus*, which used the words “As of December 1, 1985,” created an obligation to register PCB Transformers starting from the December 1, 1985 date and continuing until the registration occurs. See *Lazarus*, 7 E.A.D at 372 (December 1, 1985 transformer registration date is an “effective date” for the registration requirement). This previous regulatory language differs from the current regulation which imposes a definitive deadline for registration. 40 C.F.R. § 761.30(a)(1)(vi)(A). Additionally, the EPA complaint in the *Lazarus* case alleged “failure to register PCB Transformers” (7 E.A.D at 367), while the Complaint in this matter alleges “unauthorized use of PCB Transformers.”

The registration requirement is an “obligation” that had to be fulfilled no later than December 28, 1998. Once the deadline passed for registration, the use authorization is inapplicable and the prohibition found in TSCA section 6(e) applies. TSCA § 6(e)(2), 15 U.S.C. § 6(e)(2) (Except as authorized by the Administrator any PCB use, in any manner other than in a totally enclosed manner, was banned after January 1, 1978). TSCA’s PCB ban is reiterated in 40 C.F.R. Sections 761.20 (prohibition) and 761.30

(use authorization). Section 6(e)(2) of TSCA and 40 C.F.R. Sections 761.20 and 761.30(a)(1)(vi)(D) are the “prohibitions” of the PCB ban. Pursuant to Section 6(e)(2) of TSCA, a transformer owner must comply with all requirements for use promulgated by the EPA to continue the PCB Transformers authorization for use. 40 C.F.R. §§ 761.20 and 761.30.

The current PCB Transformer registration rule is more stringent than the previous rule. In the preamble to the regulations, the EPA set out the rationale for the changes to the regulations. Among those reasons cited was the massive non-compliance with the fire department registration requirement. “[M]any 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.” 63 Fed. Reg. 35384, 35393 (June 29, 1998). Another reason for the modification to the registration requirement was to provide access to PCB Transformer locations to all Federal, State and local emergency response personnel, not just the local fire department. *Id.*

Instituting a deadline after which an authorization is terminated is not novel in environmental law. The Third Circuit Court of Appeals upheld the termination of interim status under the Resource Conservation and Recovery Act in *Vineland Chemical Co., Inc.*, 810 F.2d 402, 404 (1987). *Vineland Chemical Co., Inc.* (“*Vineland*”) failed to submit a certification of financial responsibility “before the date twelve months after November 8, 1984.” *Id.* The EPA determined that *Vineland* “had not satisfied the relevant certification requirement,” and *Vineland* could “no longer operate its hazardous waste disposal facility under interim status.” *Id.* at 403.

In the present matter, Respondent had two PCB Transformers in use at the Ramsey location since its 1969 construction. During the May 2009 inspection, the EPA determined that the PCB Transformers were nameplate transformers and recognizable as PCB Transformers which should have been registered in 1998. Once the deadline passed for registration, the use authorization was inapplicable and the prohibition found in TSCA section 6(e) applied. TSCA § 6(e)(2), 15 U.S.C. § 2605. “The PCB ban was clearly intended as permanent.” *Lazarus*, 7 E.A.D. at 370.

E. EPA’s Application of the Registration Requirement is Consistent with Legislative History

“The statutory prohibition clearly evidences an intent to institute a PCB ban beginning on the first day of 1978 and to continue the ban every day thereafter.” *Lazarus*, 7 E.A.D. at 368. Congress weighed the economic burdens that the PCB ban would impose and considered them insubstantial in comparison to the health and other benefits. H. Rep. 94-1341 (Interstate and Foreign Commerce Committee), at 7 (1976). Legislative history for TSCA acknowledges the EPA’s ability to regulate chemicals with “restrictive requirements.” S. Rep. No. 94-698, at 6 (1976). “Remedies available to the Administrator range from outright prohibitions to simple labeling requirements.” *Id.* (emphasis added).

Owners who failed to register PCB Transformers by December 28, 1998 are subject to the PCB ban. Imposing a deadline for PCB Transformer registration after which the PCB ban becomes effective is an exercise of EPA’s authority under TSCA to utilize outright prohibitions. The registration deadline comports with the authority granted to EPA by TSCA and the legislative intent to ban PCBs.

F. Respondent Seeks an Untimely Judicial Review of EPA's Registration Requirement

Pursuant to Section 19 of TSCA, any person may file a petition for judicial review with the United States Court of Appeals no later than 60 days after the date of a rule promulgated under Section 2605(e). TSCA § 19(a)(1)(A), 15 U.S.C. § 2618(a)(1)(A). Respondent asserts that it seeks "judicial review of the EPA construction of 40 C.F.R. §§ 761.30 (a)(l)(vi)(D) and (A)." The Court in *Dow Chemical Co. v. Costle*, 484 F.Supp. 101 (D.Del. 1980), addressing the question of whether a given argument constitutes an attack on the validity of a regulation or upon an interpretation or application stated that:

Two principal questions ought to be addressed in determining whether a given attack is upon the validity of a regulation or it is upon an interpretation or application of that regulation. The first question is whether the challenged interpretation or application was obvious at the time the regulation was published. If it were obvious, the challenge would be more likely to be an attack on the validity of the regulation. . . . A number of factors might be relevant to the question of obviousness. Such factors would include the ambiguity of the language of the regulation on its face, the regulatory history, the comments received, the understandings of those involved in and commenting upon the regulation at the time of promulgation, relevant judicial decisions, and the use of the language in past regulations. The second major question which must be addressed is the question of the nature of the attack. An argument that a given interpretation or application is not authorized by the statute or is unconstitutional is more likely to be an attack upon its validity. An argument which relies solely on the words of the regulation, the regulatory history, and agency practice is more likely to involve genuine questions of interpretation or application. The court in *Utah Power & Light* alluded to the importance of this question when it noted that "courts have distinguished between claims that an agency's action is ultra vires and claims that an agency's interpretation of the act it administers is legally unsound."

Dow Chemical Co. v. Costle, 484 F.Supp. 101, 107-08 (citing *Utah Power & Light*, 553 F.2d 215, 218 n.13.).

EPA's interpretation or application of the national PCB Transformer registration requirement was obvious at the time the regulation was published. The 1994 preamble to the proposed rule advised the regulated community that "this requirement would be a part of the authorization for continued use for each PCB Transformer." 59 Fed. Reg. 62788, 62838 (December 6, 1994). The preamble to the final rule stated that the national registration requirement for PCB Transformers was a "condition of the authorization for continued use" and that "PCB Transformers that are not registered are not authorized for use and must be disposed of." 63 Fed. Reg. 35384, 35394 (June 29, 1998). There is no ambiguity in the language of the regulation on its face. As a requirement for use authorization, PCB Transformers had to have been registered no later than December 28, 1998. 40 C.F.R. §§ 761.20 and 761.30.

The nature of Respondent's attack also leads to the conclusion that the arguments are an attack on the validity of the regulation.⁹ *Dow Chemical Co.* tells us that "[a]n argument that a given interpretation or application is not authorized by the statute or is unconstitutional is more likely to be an attack upon its validity." 484 F.Supp. at 107-08. Respondent claims that EPA's regulatory construction is "inconsistent with the legislative purpose of Section 6(e) of TSCA." (Answer, page 6.) As discussed in Section V.E., *supra*, EPA's application of the PCB Transformer registration regulations at issue implements the Congressional PCB ban found in TSCA Section 6(e).

⁹ Respondent also claims that "the imposition of any penalty is barred by the doctrine of unclean hands." (Answer, page 4.) However, there is no fraud or deceit on the part of the EPA in this matter. See *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245 (1933).

Respondent's claim that EPA's regulatory construction is a "taking of Okonite's property without due process of law" (Answer, page 4.) is without merit. Constitutional due process requires a regulation to be sufficiently clear before depriving a party of property by imposing a civil penalty. *Environmental Protection Services, Inc.*, 13 E.A.D. 506, 549 (2008). The text of the PCB Transformer registration regulations and the explanation provided in the final rule preamble are sufficiently clear to have informed Respondent of the conditions for use authorization. See Section V.D.3., *supra*. The EPA's action in the present matter is neither "arbitrary" nor "capricious."

Respondent contends that EPA's construction "in the instant matter is inconsistent with the construction EPA places on those sections in other enforcement proceedings" denying Respondent "equal protection of the law." (Answer, page 4.) Respondent seems to claim that it is a "class of one" being singled out for discriminatory treatment without regard to any group affiliation.¹⁰ There are other proceedings in which EPA Region 2 applied the regulations in the exact same manner.¹¹ Additionally, EPA's September 23, 2009 letter informed Respondent that EPA Region 2's interpretation of the registration regulation accorded with that of EPA Headquarters which disseminates policy for the Agency. (Complainant's Exhibit 4.)

¹⁰ See *In re Desert Rock Energy Company, LLC*, 14 E.A.D. ___, 2009 WL 3126170, at 12 (2009) "Generally, under equal protection jurisprudence, in order to establish a class of one claim, a party must show that it has intentionally been treated differently than others with whom it is similarly situated." *Id.* "In addition, a party must show that there is no rational basis for the government's differential treatment." *Id.* at 32 n.27.

¹¹ Other proceedings alleging unauthorized use of PCB Transformers are: *In re Saint Joseph's Medical Regional Center*, Docket No. TSCA-02-2007-9105; *In re New Jersey Department of Human Services*, Docket No. TSCA-02-2007-9107; and, *In re New York Institute of Technology*, Docket No. TSCA-02-

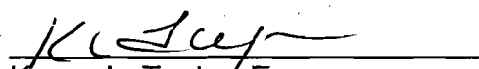
Respondent argues that the “construction placed on 40 C.F.R. §§ 761.30 (a)(l)(vi)(D) and (A) by the EPA . . . is an ultra vires engrafting of new language onto the applicable regulations.” (Answer, page 6.) *Dow Chemical Co.* stated that “courts have distinguished between claims that an agency's action is ultra vires and claims that an agency's interpretation of the act it administers is legally unsound.” 484 F.Supp. at 108. Respondent's claims that EPA's action is ultra vires, not authorized by the statute, and unconstitutional are an attack upon the validity of the PCB Transformer regulations. Thus, Respondent is attempting to challenge the regulations outside of the narrow time frame provided by TSCA Section 19(a)(1)(A), 15 U.S.C. § 2618(a)(1)(A).

The final rule for the PCB transformer registration requirement was promulgated for the purposes of judicial review on July 29, 1998. 63 Fed. Reg. 35384, 35384 (June 29, 1998). Respondent has been in business since 1878. Respondent's Ramsey location was constructed in 1969, and the PCB Transformers at that location have been in use since 1969. Respondent now seeks an untimely judicial review of a regulation promulgated in 1998. Under TSCA Section 19, challenges to regulations must have been brought “[n]ot later than 60 days after the date of the promulgation of a rule.” 15 U.S.C. § 2618(a)(1)(A).

VI. CONCLUSION

For all the reasons set forth above, Complainant respectfully requests that this Court find Respondent liable to the United States for the violations alleged in the Complaint, and such further Orders that this Court may deem fit and proper. The relevant facts as to liability in this matter are not in issue. Therefore, an order finding Respondent liable is appropriate in this matter.

Respectfully submitted,



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Dated: October 18, 2010

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

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing COMPLAINANT'S BRIEF bearing the above-referenced docket number, in the following manner to the respective addressees below:

Original and One Copy
by Hand:

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Dated: OCT 18 2010
New York, New York

