

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY



BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
The Okonite Company, Inc.,) Docket No. TSCA-02-2010-9104
)
)
Respondent)

ORDER SCHEDULING ORAL ARGUMENT

The United States Environmental Protection Agency, Region 2 ("Complainant" or "EPA"), initiated this proceeding by filing a Complaint and Notice of Opportunity for Hearing ("Complaint") against The Okonite Company, Inc. ("Respondent" or "Okonite"), on February 24, 2010.^{1/} The Complaint alleges in two counts that Respondent violated the federal regulations governing polychlorinated biphenyls ("PCBs"), promulgated pursuant to Section 6(e) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2605(e), and set forth at 40 C.F.R. part 761, and that Respondent thereby violated Section 15 of TSCA, 15 U.S.C. § 2614.

Specifically, the Complaint alleges that, on or about May 7, 2009, representatives of EPA conducted an inspection of a facility

^{1/} The record before the undersigned reflects that the Complaint was sent to Respondent and the Regional Hearing Clerk on December 2, 2009. However, the Regional Hearing Clerk did not stamp the Complaint as received until February 24, 2010. A document is "filed," as that term is used in the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-32, on the date it is received and stamped by the appropriate Hearing Clerk. 40 C.F.R. § 22.5. The parties are advised that the undersigned relies on this official filing date, not the postmark date, in determining the timeliness of a particular document.

owned and operated by Respondent in Ramsey, New Jersey ("Facility"), pursuant to Section 11 of TSCA, 15 U.S.C. § 2610, and that, at the time of the inspection, Respondent was using a PCB Transformer, as that term is defined by 40 C.F.R. § 761.3, at both the main building and utility building of the Facility. Complaint ("Compl.") ¶¶ 9, 14, 15, 23, 24. Pursuant to 40 C.F.R. § 761.20, no person may use any PCB or PCB Item, as those terms are defined by 40 C.F.R. § 761.3, in any manner other than in a totally enclosed manner, unless authorized by 40 C.F.R. § 761.30. In turn, 40 C.F.R. § 761.30(a)(1)(vi)(A) requires owners of PCB Transformers to register their transformers with EPA no later than December 28, 1998, and 40 C.F.R. § 761.30(a)(1)(vi)(D) requires owners of PCB Transformers to comply with the requirements of 40 C.F.R. § 761.30(a)(1)(vi)(A) "in order to continue the PCB-Transformer's authorization for use or storage for reuse" under TSCA. The Complaint alleges that Respondent failed to register its PCB Transformers until April 5, 2005, and that "Respondent's use of a PCB Transformer which was not registered with the Environmental Protection Agency by December 28, 1998,....constitutes the unauthorized use of PCBs" in violation of 40 C.F.R. §§ 761.20 and 761.30(a)(1)(vi). Compl. ¶¶ 16-18, 25-27. The Complaint does not specify the period of alleged violation.

On February 24, 2010, Respondent filed an Answer to Complaint, Counterclaims and Request for Hearing ("Answer"), in which Respondent admits that it owns, uses, and maintains two transformers containing PCBs at the Facility and that it failed to register the transformers by December 28, 1998, as required. Answer ¶¶ 7, 13. However, Respondent objects to Complainant's construction of 40 C.F.R. §§ 761.30(a)(1)(vi)(A) and 761.30(a)(1)(vi)(D), which, Respondent argues, effectively requires a transformer to be removed from service when the owner fails to register it by December 28, 1998, even if the owner subsequently registers it and otherwise complies with the requirements of 40 C.F.R. § 761.30(a)(1). Answer at 3,4. Respondent also contends that the Complaint is barred by the five-year statute of limitations set forth at 28 U.S.C. § 2462. Answer at 4.

Pursuant to the Prehearing Order issued by the undersigned on May 4, 2010, the parties subsequently filed their prehearing exchanges. In its Prehearing Exchange, dated July 1, 2010, and its Rebuttal Prehearing Exchange, dated August 26, 2010, Complainant maintains that, pursuant to 40 C.F.R. § 761.30(a)(1)(vi)(D), "any PCB Transformer not registered by December 28, 1998 is no longer authorized for use." Complainant's Rebuttal Prehearing Exchange ("C's Rebuttal PHE") at 4. Complainant further contends that "unauthorized transformer use violations are continuing in nature" and that, accordingly, the violations alleged in the Complaint

"commenced when Respondent failed to [register its two PCB Transformers by December 28, 1998,] and continue to the present date" because Respondent has not removed the PCB Transformers from use or converted them to non-PCB Transformers. C's Rebuttal PHE at 4-5; Complainant's Prehearing Exchange ("C's PHE") at 11. For these alleged continuing violations, Complainant proposes in its Prehearing Exchange that the undersigned impose "a one-day penalty..., as of the May 7, 2009 inspection." C's PHE at 12.

In its Prehearing Exchange, dated August 6, 2010, Respondent challenges Complainant's contentions as inconsistent with the policies underlying Section 6(e)(2)(B) of TSCA, 15 U.S.C. § 2605(e)(2)(B), and 40 C.F.R. § 761.30, and the decision issued by the Environmental Appeals Board in *In re Lazarus*, 7 E.A.D. 318 (EAB 1997). Respondent's Prehearing Exchange ("R's PHE") at 4-5, 8. Respondent argues that, contrary to Complainant's position, the obligation to register PCB Transformers is continuing and that, once the obligation is fulfilled, the use of the PCB Transformers is authorized by 40 C.F.R. § 761.30(a). R's PHE at 8-9. Respondent contends, therefore, that its use of the two PCB Transformers at its Facility was in compliance with the law on May 7, 2009, the date of violation alleged by Complainant in its Prehearing Exchange, because it had registered the PCB Transformers on April 5, 2005. R's PHE at 9. Respondent asserts that this question of law is the dispositive issue in the case, as the "main facts...are few, straightforward and not in dispute." R's PHE at 1.

Upon consideration of the record, the undersigned agrees that the parties do not dispute the fundamental facts underlying the violations alleged in the Complaint. The undersigned also agrees that the legal arguments presented by the parties in the pleadings and prehearing exchanges raise a question of law that is the dispositive issue in this matter. Such questions of law are appropriate for resolution by oral argument. Section 22.4(c)(10) of the Rules of Practice, 40 C.F.R. § 22.4(c)(10), authorizes Administrative Law Judges to "take all measures necessary for the maintenance of order and of the efficient, fair and impartial adjudication of issues arising in proceedings governed by [the Rules of Practice]." Such measures include conducting oral argument when oral argument would assist in the fair and efficient resolution of legal issues raised in a case.

Accordingly, the undersigned directs the parties to participate in oral argument on the legal issue of whether failure to register a PCB Transformer by December 28, 1998, pursuant to 40 C.F.R. § 761.30(a)(1)(vi)(A), precludes subsequent registration and authorized use of the PCB Transformer. The parties are directed to

file briefs on this issue on or before **October 14, 2010**. The oral argument on this issue will be held beginning at 10 a.m. on Thursday, October 28, 2010, in New York City, New York. The Regional Hearing Clerk will make appropriate arrangements for a courtroom and retain a stenographic reporter. The parties will be notified of the exact location and of other procedures pertinent to the oral argument when those arrangements are complete. Individuals requiring special accommodation at the oral argument, including wheelchair access, should contact the Regional Hearing Clerk at least five business days prior to the oral argument so that appropriate arrangements can be made.

IF ANY PARTY DOES NOT INTEND TO ATTEND THE ORAL ARGUMENT OR HAS GOOD CAUSE FOR NOT BEING ABLE TO ATTEND THE ORAL ARGUMENT AS SCHEDULED, IT SHALL NOTIFY THE UNDERSIGNED AT THE EARLIEST POSSIBLE MOMENT.



Barbara A. Gunning
Administrative Law Judge

Dated: September 8, 2010
Washington, D.C.

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Scheduling Oral Argument**, dated September 8, 2010, was sent this day in the following manner to the addressees listed below.



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Legal Staff Assistant

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Dated: September 8, 2010
Washington, D.C.