



UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

IN THE MATTER OF )  
 )  
THE OKONITE COMPANY, INC., ) Docket No. TSCA-02-2010-9104  
 )  
 )  
RESPONDENT )

INITIAL DECISION

**Issued:** March 8, 2011

**Before:** Barbara A. Gunning  
Administrative Law Judge  
U.S. Environmental Protection Agency

**Appearances:**

For Complainant:

Karen Taylor, Esquire  
Coles Phinizy, Esquire  
U.S. Environmental Protection Agency, Region 2  
Office of Regional Counsel  
290 Broadway, 16th Floor  
New York, New York 10007

For Respondent:

Francis T. Guiliano, Esquire  
Vice President and General Counsel  
The Okonite Company, Inc.  
102 Hilltop Road  
P.O. Box 340  
Ramsey, New Jersey 07446

**I. PROCEDURAL HISTORY**

On February 24, 2010, the United States Environmental Protection Agency ("EPA" or "Agency"), Region 2 ("Complainant" or "Region 2"), initiated this proceeding by filing a Complaint and Notice of Opportunity for Hearing ("Complaint") against The Okonite Company, Inc. ("Respondent" or "Okonite"). The Complaint alleges in two counts that Respondent violated 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 codified at 40 C.F.R. part 761, and that Respondent thereby violated Section 15 of TSCA, 15 U.S.C. § 2614.

Specifically, the Complaint charges Respondent with the unauthorized use of PCBs at its facility in Ramsey, New Jersey. Complaint ("Compl.") ¶¶ 17, 26. The Complaint alleges that Respondent was using two PCB Transformers, as that term is defined by 40 C.F.R. § 761.3, at its facility as of May 7, 2009, the date on which representatives of EPA conducted an inspection of the facility. Compl. ¶¶ 14, 15, 23, 24. The Complaint further alleges that, although Respondent registered those PCB Transformers with EPA on April 5, 2005, the use of PCB Transformers not registered with EPA by December 28, 1998, as required by 40 C.F.R. § 761.30(a)(1)(vi)(A), constitutes the unauthorized use of PCBs and a failure or refusal to comply with 40 C.F.R. §§ 761.20 and 761.30(a)(1)(vi), in violation of Section 15(1)(C) of TSCA, 15 U.S.C. § 2614(1)(C). Compl. ¶¶ 16-18, 25-27. The Complaint otherwise does not specify the period in which Respondent allegedly engaged in the unauthorized use of PCBs. However, the Complaint proposes that a civil administrative penalty in the aggregate amount of \$33,500 be assessed against Respondent for the alleged violations. Compl. at 4.

Respondent subsequently filed an Answer to Complaint, Counterclaims and Request for Hearing ("Answer"). In its Answer, Respondent concedes that it owns, uses, and maintains two transformers containing PCBs at its facility in Ramsey, New Jersey; that Respondent is subject to the regulations governing PCBs set forth at 40 C.F.R. part 761; that its transformers are PCB Transformers, as defined by 40 C.F.R. § 761.3; and that Respondent failed to register its PCB Transformers by December 28, 1998, the date prescribed by 40 C.F.R. § 761.30(a)(1)(vi)(A). Answer ¶¶ 7, 8, 13, 15, at 3. Respondent denies, however, that its use of the PCB Transformers was unauthorized as alleged in the Complaint. Answer ¶ 17, at 3. Respondent asserts six affirmative defenses and five counterclaims against Region 2, each of which derives from its objection to Region 2's construction of the regulations to mean that, when the owner of a PCB Transformer fails to register it by December 28, 1998, use of the PCB Transformer is unauthorized from that date forward, even if the owner subsequently registers it and otherwise complies with applicable requirements. Answer at 3-7. In contrast, Respondent claims that its failure to register the PCB Transformers by December 28, 1998, was cured by its registration of the PCB Transformers on April 5, 2005, and that its use of the PCB Transformers was authorized thereafter. Answer at 6.

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, Region 2

maintains that "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. Region 2 further contends that, because "unauthorized transformer use violations are continuing in nature," the violations alleged in the Complaint "commenced when Respondent failed to [register its 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. See also Complainant's Prehearing Exchange ("C's PHE") at 11. For these alleged violations, Region 2 proposes in its Prehearing Exchange that the undersigned impose a penalty for one day of violation, May 7, 2009, the date on which representatives of EPA conducted the inspection of Respondent's facility. C's PHE at 11-12.

In its Prehearing Exchange, dated August 6, 2010, Respondent challenges Region 2's arguments 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 *Lazarus, Inc.*, 7 E.A.D. 318 (EAB 1997). Respondent's Prehearing Exchange ("R's PHE") at 4-5, 8. Respondent contends that, contrary to Region 2'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 argues, therefore, that its use of the PCB Transformers was in compliance with the law on May 7, 2009, because it had registered the PCB Transformers on April 5, 2005. R's PHE at 9.

By Order dated September 8, 2010, the undersigned observed that, while the facts of this matter are essentially undisputed, the legal arguments presented by the parties in their pleadings and prehearing exchanges raised the dispositive issue: 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. Finding that this issue is a question of law appropriate for resolution by oral argument, the undersigned directed the parties to file briefs and participate in oral argument on the issue.<sup>1/</sup> Both parties filed their briefs on October 18, 2010, and participated in oral argument in New York City, New York, on October 28, 2010. Attorneys Karen Taylor and Coles Phinizy appeared on behalf of Region 2. Francis T. Guiliano, Vice President and General Counsel for Respondent, appeared on behalf of Respondent.

---

<sup>1/</sup> At the request of the parties, the schedule for filing briefs established by the Order of September 8, 2010, was orally modified on October 12, 2010.

For the reasons discussed below, having fully considered the record in this case, the arguments of the parties, and being fully advised, the undersigned finds that, in requiring owners of PCB Transformers to register their PCB Transformers with EPA by December 28, 1998, 40 C.F.R. § 761.30(a)(1)(vi)(A) establishes a continuing obligation to register, such that failure to register a PCB Transformer by December 28, 1998, does not preclude subsequent registration and authorized use of the PCB Transformer. Accordingly, Respondent is found not liable for the violations alleged in Counts 1 and 2 of the Complaint.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a corporation organized in the State of New Jersey. Accordingly, Respondent is a "person" as defined by 40 C.F.R. § 761.3. Compl. ¶ 6; Answer ¶ 6.

2. Respondent's principal place of business is located at 102 Hilltop Road, Ramsey, New Jersey 07446 ("the Facility"). Answer at 1.

3. The Facility is comprised of a three-story office building and a small ancillary building, which are owned, operated, and/or controlled by Respondent. Compl. ¶ 5; Answer ¶ 4, 5.

3. On May 7, 2009, representatives of EPA conducted an inspection of the Facility pursuant to Section 11 of TSCA, 15 U.S.C. § 2610 ("Inspection"). Compl. ¶ 9; Answer ¶ 9.

4. As of the date of the Inspection and continuing to the present day, Respondent owns, uses, and maintains two transformers containing "PCBs," as that term is defined by 40 C.F.R. § 761.3, at the Facility. The first such transformer serves the office building, and the second such transformer serves the ancillary building. Compl. ¶¶ 7, 14, 23; Answer ¶¶ 7, 14, at 3.

5. The transformers owned, used, and maintained by Respondent at the office building and ancillary building of the Facility are "PCB Transformers," and consequently, "PCB Items," as those terms are defined by 40 C.F.R. § 761.3. Compl. ¶¶ 15, 24; Answer ¶ 15, at 3; Oral Argument Transcript ("Tr.") 52:18-23.

6. Respondent is subject to federal regulations governing PCBs, promulgated pursuant to Section 6(e) of TSCA, 15 U.S.C. § 2605(e), and codified at 40 C.F.R. part 761. Compl. ¶ 8; Answer ¶ 8.

7. Respondent registered its PCB Transformers with EPA on April 5, 2005. Compl. ¶¶ 16, 25; Answer ¶¶ 13, 16, at 3.

8. Respondent's continued use of its PCB Transformers after failing to register them by December 28, 1998, constitutes the

unauthorized use of PCBs and a failure or refusal to comply with 40 C.F.R. §§ 761.20 and 761.30(a)(1)(vi), in violation of Section 15(1)(C) of TSCA, 15 U.S.C. § 2614(1)(C). The violation began on December 28, 1998, and continued through April 5, 2005, the date on which the PCB Transformers were registered. From April 6, 2005, to the present date, Respondent's continued use of its PCB Transformers did not constitute unauthorized use for failure to register its PCB Transformers or a failure or refusal to comply with 40 C.F.R. §§ 761.20 and 761.30(a)(1)(vi), in violation of Section 15(1)(C) of TSCA, 15 U.S.C. § 2614(1)(C).

9. Region 2 seeks to assess a penalty for one day of violation, May 7, 2009. C's PHE at 12.

10. On May 7, 2009, Respondent's continued use of its PCB Transformers did not constitute unauthorized use for failure to register its PCB Transformers or a failure or refusal to comply with 40 C.F.R. §§ 761.20 and 761.30(a)(1)(vi), in violation of Section 15(1)(C) of TSCA, 15 U.S.C. § 2614(1)(C). Thus, Respondent is found not liable for the violations alleged in Counts 1 and 2 of the Complaint.

### III. DISCUSSION

#### A. Statutory and Regulatory Background

Establishing a broad statutory prohibition on the use of PCBs, Section 6(e)(2)(A) of TSCA, 15 U.S.C. § 2605(e)(2)(A), provides that no person may use any PCB in any manner other than in a "totally enclosed manner" after January 1, 1978. Pursuant to Section 6(e)(2)(B) of TSCA, the only exceptions to this statutory prohibition are those specifically authorized by the Administrator of EPA:

The Administrator may by rule authorize the...use...of any polychlorinated biphenyl in a manner other than in a totally enclosed manner if the Administrator finds that such...use...will not present an unreasonable risk of injury to health or the environment.

15 U.S.C. § 2605(e)(2)(B).

The regulations promulgated by EPA to implement TSCA reiterate the statutory prohibition on the use of PCBs, except to the extent that EPA authorizes the use of PCBs in a non-totally enclosed manner. Entitled "Prohibitions and exceptions," the regulations at 40 C.F.R. § 761.20(a) provide, in relevant part, that no person may use any PCB in a manner other than in a totally enclosed manner unless authorized by 40 C.F.R. § 761.30. Entitled "Authorizations," the regulations at 40 C.F.R. § 761.30 contain the rules EPA promulgated pursuant to Section 6(e)(2)(B) of TSCA authorizing certain uses of PCBs in a non-totally enclosed manner.

Of particular relevance here, 40 C.F.R. § 761.30(a) authorizes the use of PCBs in transformers, subject to certain conditions set forth at 40 C.F.R. § 761.30(a)(1), including the requirement to register PCB Transformers at issue in this matter:

The following non-totally enclosed PCB activities are authorized pursuant to section 6(e)(2)(B) of TSCA:

(a) Use in and servicing of transformers (other than railroad transformers). PCBs at any concentration may be used in transformers...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....

\* \* \* \*

(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 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)(A) and (D).

The regulations at 40 C.F.R. § 761.3, in pertinent part, define the following: a "person" means any natural or judicial person, including any individual, corporation, partnership, or association; "PCBs" mean any chemical substance that is limited to the biphenyl molecule that has been chlorinated to varying degrees; "PCB Item" means anything that deliberately or unintentionally contains or has a part of it any PCB; and "PCB Transformer" means any transformer that contains 500 ppm PCBs or greater.

**B. *Lazarus, Inc.***

The regulation establishing the requirement to register PCB Transformers, as originally promulgated in July 1985, received attention from the Environmental Appeals Board ("EAB" or "Board") in *Lazarus, Inc.*, 7 E.A.D. 318 (EAB 1997) ("*Lazarus*"). As described more fully below, both parties in this case rely upon *Lazarus* to a significant degree to frame their respective

arguments. Accordingly, I find that a discussion of *Lazarus* would be helpful at this time, before I turn to the arguments presented by the parties in this matter.

The relevant question presented in *Lazarus* was whether violations of the registration requirement are "continuing" in nature for statute of limitations purposes. The applicable statute of limitations, set forth at 28 U.S.C. § 2462, bars the Government from commencing a civil penalty action after the five-year limitations period expires. *Lazarus*, 7 E.A.D. at 364. While the limitations period typically begins to run on the date a violation first accrues, the doctrine of continuing violations provides a special rule for determining when a violation accrues, such that the limitations period for violations deemed to be "continuing" in nature does not begin to run until the unlawful course of conduct is completed. *Id.* Thus, a civil penalty action may be initiated at any time during the period of continuing violations and up to five years after the violations have ceased. *Id.* at 364-65.

At the time the EAB decided *Lazarus*, the regulation imposing the requirement to register PCB Transformers read as follows:

As of December 1, 1985, all PCB Transformers (including PCB Transformers in storage for reuse) *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) (effective August 16, 1985) (emphasis added). Filed in June 1993, the complaint in *Lazarus* alleged several violations of the regulations governing PCBs, including failure to register two PCB Transformers with local fire response personnel by December 1, 1985. *Lazarus*, 7 E.A.D. at 324, 367. The respondent conceded that it had failed to register its PCB Transformers until February 20, 1992, but claimed that the statute of limitations period had expired in 1990 and that the Government was therefore barred from assessing a civil penalty for these particular violations. *Id.* at 367. The Board noted that the respondent's position on the issue "presume[d] that the registration requirement [was] a one-time requirement, as opposed to a continuing obligation." *Id.*

In order to determine whether the doctrine of continuing violations applied to violations of the registration requirement, the Board employed an analytical framework it had adopted in *Harmon Electronics, Inc.*, 7 E.A.D. 1 (EAB 1997), in which the Board analyzed whether particular obligations imposed by the Resource Conservation and Recovery Act ("RCRA") are continuing in nature. *Lazarus*, 7 E.A.D. at 366. This framework requires, first, looking to "the statutory language that serves as the basis for the specific violation at issue," including a review of the legislative

history if necessary, and second, examining the implementing regulations and regulatory history, particularly "where the substance of a requirement is found in the regulation rather than the statute." *Id.* "Words and phrases connoting continuity and descriptions of activities that are typically ongoing are indications of a continuing nature. In contrast, a continuing nature may be negated by requirements that must be fulfilled within a particular time frame." *Id.*

In accordance with this methodology, the Board first examined the statutory language of Sections 6(e)(2)(A) and 6(e)(2)(B) of TSCA and the relevant legislative history. Describing the statutory prohibition on the use of PCBs set forth at Section 6(e)(2)(A) as the "PCB ban" and the regulations authorizing the use of PCBs promulgated by EPA pursuant to Section 6(e)(2)(B) as "use authorizations," the Board found:

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.

*Lazarus*, 7 E.A.D. at 369.

The Board then examined the regulations authorizing the use of PCB Transformers and the relevant regulatory history. The Board observed that EPA had determined that the use of PCB Transformers does not present unreasonable risks to health or the environment as long as certain conditions, including the registration requirement, are met. *Id.* at 370. Accordingly, the Board found:

Unless the conditions for a transformer use authorization are complied with, the use authorization is inapplicable. If a use authorization is inapplicable, the PCB ban applies....[B]ecause the PCB ban was clearly intended as permanent, the conditions of use authorizations must be continuing obligations to effectively carry out the ban.

*Lazarus*, 7 E.A.D. at 370.

In examining the text of the regulation establishing the registration requirement, the Board found that the use of the date December 1, 1985, did not limit the applicability of the regulation to a particular time frame and alter the ongoing nature of the obligation to register PCB Transformers to a one-time requirement. *Lazarus*, 7 E.A.D. at 372. Rather, the Board found that the date was simply an effective date for the registration requirement, which was "apparent from the regulatory text requir[ing] that 'as of' this date, transformers must 'be registered.'" The regulation was promulgated some five months prior to December 1, 1985, but EPA

provided facilities time to comply with the new requirement." *Id.*

Finally, the Board found additional support for the continuing nature of the registration requirement in the regulatory history. The Board noted that the purpose of the registration requirement was to address the hazards posed by fires involving PCB Transformers and that, "[b]ecause a fire might occur at any time during the useful life of a PCB transformer, it follows that such transformers are subject to the registration requirement on an ongoing basis." *Lazarus*, 7 E.A.D. at 371-72. The Board also noted that EPA's use of particular phrases in the preambles to the proposed and final rules, such as "continued use" and "remaining useful life of PCB Transformers," further suggested that the duty to register is continuing. *Id.* at 372.

Upon completing its analysis, the Board concluded:

[W]e find 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, [the respondent] was not using its transformers in accordance with the conditions of the use authorization....The violation began on the effective date in 1985 and continued through February 20, 1992, the date on which the transformers were registered. Thus, the five-year limitations period only began to run on February 20, 1992, once the violation ceased.

*Lazarus*, 7 E.A.D. at 372.

### **C. Arguments of the Parties**

As noted above, the parties presented legal arguments in their pleadings and prehearing exchanges that raised the issue of whether failure to register a PCB Transformer by December 28, 1998, precludes subsequent registration and authorized use of the PCB Transformer. The parties further addressed this issue in their briefs and at oral argument. Their respective arguments are summarized as follows.

#### **1. Region 2's Arguments**

Region 2 maintains that the failure to register PCB Transformers with EPA by December 28, 1998, pursuant to 40 C.F.R. § 761.30(a)(1)(vi)(A), results in the unauthorized use of those transformers, which constitutes a continuing violation that does not cease until the PCB Transformers are either removed from service or reclassified in accordance with the applicable regulations. Complainant's Brief ("C's Br.") at 25; Tr. at 5:16-

21. Accordingly, Region 2 argues, "[t]here is no opportunity to register a PCB Transformer 'late.'"<sup>2/</sup> C's Br. at 25.

Region 2 acknowledges the EAB's holding in *Lazarus* that the regulation establishing the duty to register, as promulgated in 1985, "created an obligation to register PCB Transformers starting from the December 1, 1985 date and continuing until the registration occurs." C's Br. at 32 (citing *Lazarus*, 7 E.A.D. at 372). Region 2 argues that this holding does not apply to the present matter, however, because of EPA's revision of the regulatory language after *Lazarus* was decided. In particular, Region 2 contrasts the duty to register "as of December 1, 1985" found in the 1985 regulation with the duty to register "no later than December 28, 1998" found in the current regulation. Region 2 argues that, while the EAB held that the "as of" language imposed an "effective date" that allowed for late registration, the "no later than" language implements the statutory prohibition in a different manner by "impos[ing] a definitive deadline for registration." C's Br. at 32. See also Tr. at 28:12-18 and 29:10-17.<sup>3/</sup>

To support its interpretation of 40 C.F.R. § 761.30(a)(1)(vi)(A) as imposing a "definitive deadline," Region 2

---

<sup>2/</sup> Region 2 identifies an exception to this alleged prohibition on registering PCB Transformers after December 28, 1998: pursuant to 40 C.F.R. § 761.30(a)(1)(vi)(A)(1), when an owner of a transformer who assumes that the transformer is a PCB-Contaminated Transformer (a transformer that contains more than 50 ppm but less than 500 ppm PCBs) but discovers after December 28, 1998, that the transformer is, in fact, a PCB Transformer, the owner is required to register the newly-identified PCB Transformer with EPA no later than 30 days after the discovery. Region 2 asserts that Respondent's PCB Transformers are not subject to this exception. C's Br. at 20-22. See also C's PHE at 10. While Respondent objects to this contention in its Prehearing Exchange, R's PHE at 7, Respondent does not renew its arguments in its Brief or at oral argument. Thus, I find that the exception for newly-identified PCB Transformers does not apply to the present matter.

<sup>3/</sup> Region 2 also attempts to distinguish *Lazarus* in its Rebuttal Prehearing Exchange and Brief on the basis that the complaint in *Lazarus* alleged "failure to register PCB Transformers," while the Complaint in the instant matter alleges "unauthorized use of PCB Transformers." C's Br. at 32; C's Rebuttal PHE at 4. However, as observed by Respondent in its Brief, the violations alleged in this case arise from Respondent's failure to register its PCB Transformers by the date prescribed in 40 C.F.R. § 761.30(a)(1)(vi)(A). Respondent's Brief ("R's Br.") at 9. Accordingly, I do not find Region 2's distinction to be legally significant.

first relies upon the text of the regulation. Region 2 argues that "[t]he plain meaning of the words '[n]o 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." C's Br. at 31. Region 2 reasons that registration forms received after December 28, 1998, necessarily do not satisfy the requirement to register "no later than" that date. *Id.*

Region 2 claims to find additional support for its position in the regulatory history of the current regulation. Region 2 focuses in particular on the preamble to the final rule, published in 1998, which states 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.'" C's Br. at 31-32 (quoting 63 Fed. Reg. 35,384, 35,394 (June 29, 1998) ("Final Rule")). See also Tr. at 10:3-18 and 11:22-23. Region 2 also refers to the rationale propounded by EPA for amending the regulations, including the widespread failure of the regulated community to comply with the previous regulations requiring registration of PCB Transformers with local fire response personnel. C's Br. at 33; Tr. at 11:25 and 12:2-6.

Region 2 contends that its position is also consistent with the statutory prohibition on the use of PCBs set forth at Section 6(e)(2)(A) of TSCA. C's Br. at 30, 34; Tr. at 13:25 and 14:2-6. Region 2 asserts that, once the owner of PCB Transformers fails to register the transformers by December 28, 1998, the authorization for use is inapplicable and the statutory prohibition applies. C's Br. at 32. Region 2 then reasons that, because Congress intended for the statutory prohibition to be permanent, *Lazarus*, 7 E.A.D. at 370, the unauthorized use of PCB Transformers is a continuing violation that cannot be remedied and does not cease until the PCB Transformer is removed from service or reclassified,<sup>4/</sup> Tr. at 19:12-16.

Region 2 argues that its position is consistent with the legislative history of TSCA as well. Region 2 observes that the legislative history reflects Congress's intent to authorize EPA to

---

<sup>4/</sup> In its Prehearing Exchange, Region 2 cites *Lazarus* for the view that, "[b]ecause the PCB Transformer registration requirement is a condition of the authorization for continued use of the PCB Transformers, it is continuing in nature." C's PHE at 11 (citing *Lazarus*, 7 E.A.D. at 319). At oral argument, however, Region 2 differentiates between the doctrine of continuing violations applied by the EAB in *Lazarus* and Region 2's characterization of the unauthorized use of PCBs as a continuing violation based upon the permanency of the statutory prohibition. Tr. at 19:7-16 and 60:9-15. Thus, Region 2's reference to *Lazarus* in its Prehearing Exchange is somewhat confusing.

employ a variety of approaches to regulating chemicals under the statute, from "outright prohibitions to simple labeling requirements." C's Br. at 34 (quoting S. Rep. No. 94-698, at 6 (1976)). See also Tr. at 13:23-25. Region 2 contends that "[i]mposing 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." C's Br. at 34.

Considering together the text of the current regulation, the regulatory history, and the intent of Congress as reflected in the relevant statutory language and legislative history, Region 2 claims that "it's clear that [the current regulation]...was intended to be more stringent" than the regulation as promulgated in 1985. Tr. at 18:8-12. See also Tr. at 24:7, 25:25, and 26:2-4. Accordingly, Region 2 concludes that "[t]he 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." C's Br. at 32.

## **2. Respondent's Arguments**

Respondent contends that, contrary to Region 2's assertions, the analysis conducted by the EAB in *Lazarus* is controlling in the present matter, such that the obligation to register PCB Transformers is continuing and Respondent's violation ceased upon registering its PCB Transformers on April 5, 2005. R's Br. at 6. Respondent claims that a number of considerations lend support to its position.

First, Respondent challenges the degree of significance that Region 2 attributes to the replacement of "as of" with "no later than" when EPA revised the regulation imposing the registration requirement in 1998. Respondent observes that Region 2 fails "to cite any authority for investing this relatively minor language change with such great significance" and disputes that such "a minor textual change" would cause *Lazarus* to be decided differently. R's Br. at 7-8. Respondent also notes that the preamble to the proposed rule that forms the basis for the current regulation states that, pursuant to the 1985 regulation, "PCB Transformers were required to have been registered by December 1, 1985." R's Br. at 27 (quoting 59 Fed. Reg. 62,788, 62,820 (Dec. 6, 1994) (emphasis added) ("Proposed Rule")). Respondent contends that this reference demonstrates that EPA viewed both the "as of" language contained in the 1985 regulation and the "no later than" language contained in the current regulation as establishing deadlines for the registration of PCB Transformers. R's Br. at 27-28. Respondent argues that, because EPA "treated 'as of' and 'no later than' indistinguishably," *Lazarus* is not distinguishable from the present proceeding. R's Br. at 27-28.

Respondent identifies a number of decisions issued by the EAB that, according to Respondent, also demonstrate the applicability of *Lazarus* to this proceeding. Respondent focuses in particular on *Newell Recycling Company, Inc.*, 8 E.A.D. 598 (EAB 1999), and *Norman C. Mayes*, 12 E.A.D. 54 (EAB 2005), decisions rendered after the 1998 amendment to the regulation imposing the registration requirement in which the EAB employed the methodology used in *Lazarus* to determine whether the doctrine of continuing violations applied and favorably cited the holding of *Lazarus*. R's Br. at 11-18. Respondent argues that the EAB's reliance upon *Lazarus* in those decisions refutes the position advanced by Region 2 that *Lazarus* no longer applies and "establish[es] that the language change from 'as of' to 'no later than' was not intended to and did not effect a fundamental change in the law of continuing obligations." R's Br. at 18. See also Tr. at 38:21-23.

Respondent next disputes Region 2's claims that the preamble to the Final Rule supports its position. Respondent argues that the preamble lacks any reference to an intent to modify the regulation in the manner advocated by Region 2. R's Br. at 8, 26, and 27; Tr. at 55:23-2, 56:2, and 57:14-18. While Region 2 claims to find support for its position in the statement that "PCB Transformers that are not registered are not authorized for use and must be disposed of," Respondent counters that Region 2 misreads the statement and that it modifies the sentences immediately preceding it, which relates only to PCB Transformers transferred after December 28, 1998. Tr. at 31:8-20 and 36:3-7. Respondent focuses instead on the following language:

[C]hanges 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.

Tr. at 40:2-14 (citing 63 Fed. Reg. at 35,394). Respondent argues that this language evidences "a much clearer intention" to maximize compliance, *id.*, and that this goal would be furthered by construing 40 C.F.R. § 761.30(a)(1)(vi)(A) as establishing a continuing obligation to register PCB Transformers, R's Br. at 24. Respondent contends that Region 2's position, in contrast, would frustrate that goal by discouraging recalcitrant owners from registering their PCB Transformers. R's Br. at 23-24.

Finally, Respondent cites, among other considerations, two Consent Agreements and Final Orders ("CAFOs") entered into by Region 4 of EPA as evidence of the inconsistency of Region 2's position with the interpretation of 40 C.F.R. § 761.30(a)(1)(vi)(A) adopted by the remainder of the Agency. The CAFOs recorded in *Russellville Electric Plant Board*, EPA Docket No. TSCA-04-2002-2501(b), 2002 WL 31264044 (CAFO, June 28, 2002), and *Greenwood*

*Utilities*, EPA Docket No. TSCA-04-2003-0001(b), 2003 WL 22293682 (CAFO, July 15, 2003), each allege that the respondents failed to register their PCB Transformers by December 28, 1998, as required by 40 C.F.R. § 761.30(a)(1)(vi)(A). However, as part of the CAFOs, the respondents agreed to implement Supplemental Environmental Projects ("SEPs") requiring removal of the PCB Transformers from service. Each CAFO contains a substantially similar clause: "Respondent certifies that, as of the date of [sic] this CAFO is signed, it is not required to perform any part of the SEP by any federal, state, or local law, regulation, permit or order, or by any agreement or grant." *Russellville Elec. Plant Board*, EPA Docket No. TSCA-04-2002-2501(b), 2002 WL 31264044, at \*6 (CAFO, June 28, 2002). Accordingly, Respondent argues that, contrary to Region 2's position, 40 C.F.R. § 761.30(a)(1)(vi)(A) does not require the removal from service of PCB Transformers not registered by December 28, 1998.<sup>5/</sup> Tr. at 43:6-25, 44:2-4 and 24, and 45:5-20.

**D. The 1998 Amendment to 40 C.F.R. § 761.30(a)(1)(vi) and its Effect on the Applicability of *Lazarus***

As the foregoing discussion reflects, the arguments presented by the parties focus upon the applicability of the EAB's holding in *Lazarus* to the present proceeding, an issue that turns upon the proper interpretation of the regulation imposing the duty to register PCB Transformers, set forth at 40 C.F.R. § 761.30(a)(1)(vi)(A). As noted above, this regulation was most recently amended in 1998 and provides that, "[n]o 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...."

The Board has instructed that, "[w]hen construing an administrative regulation, the normal tenets of statutory construction are generally applied." *Bil-Dry Corp.*, 9 E.A.D. 575, 595 (EAB 2001) (citing *Black & Decker Corp. v. Commissioner*, 986 F.2d 60, 65 (4th Cir. 1993)). Accordingly, "[t]he plain meaning of words is ordinarily the guide to the definition of a regulatory term." *Id.* (citing *T.S. v. Bd. of Educ.*, 10 F.3d 87, 89 (2d Cir. 1993)). Rather than looking only at the provision at issue, the regulation as a whole should be examined. *Howmet Corp.*, 13 E.A.D. 272, 282 (EAB 2007) (citing *U.S. Army, Fort Wainwright Cent. Hearing & Power Plant*, 11 E.A.D. 126, 141 (EAB 2003)). The regulatory history, such as preamble statements, is also instructive in interpreting regulations. *Id.* (citing *Morton L. Friedman & Schmitt Const. Co.*, 11 E.A.D. 302, 328 (EAB 2004)). Additionally, the regulation should be construed so as to harmonize

---

<sup>5/</sup> In its rebuttal at oral argument, Region 2 dismisses this argument by saying that, if removal of PCB Transformers was permitted as part of a SEP, "it was done so in error on the part of EPA personnel." Tr. at 60:20-22.

with and further the objective of the statute it implements, rather than conflict with it. *Id.* (citing *Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990)). Finally, greater deference should be given "to an agency's position on a regulation when its rulings, legal interpretations, and opinions are consistent over long periods of time." *Howmet*, 13 E.A.D. at 298 (citing *Lazarus*, 7 E.A.D. at 352-53).

Pursuant to this guidance, I begin my analysis of 40 C.F.R. § 761.30(a)(1)(vi)(A) at the text of that provision as it is currently drafted. Region 2 focuses upon the "no later than" language, arguing that the plain meaning of this phrase is that December 28, 1998, serves as a "cutoff date" for registration of PCB Transformers. Region 2 reasons that registration forms received after December 28, 1998, necessarily fail to satisfy the duty to register "no later than" that date. Respondent does not address this argument in any of its filings or at oral argument. I agree with Region 2 that, on its face, the text of 40 C.F.R. § 761.30(a)(1)(vi)(A) indicates a definitive deadline for the registration of PCB Transformers. I note, however, that the provision does not explicitly require the removal or reclassification of any PCB Transformers not registered by December 28, 1998.

In fact, no portion of the regulations authorizing the use of PCB Transformers contains language explicitly requiring the removal or reclassification of PCB Transformers not registered by December 28, 1998. See 40 C.F.R. § 761.30(a). To support its position that the regulations implement the statutory ban on the use of PCBs in that manner, Region 2 urges the undersigned to consider the regulatory history of 40 C.F.R. § 761.30(a)(1)(vi), particularly the following language found in the preamble to the Final Rule:

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). However, a person who takes possession of a PCB-Transformer after the deadline for the original registration has passed does not need to register that transformer with EPA. Any person taking possession of a transferred PCB Transformer should assure that it was registered under the requirement of § 761.30(a)(1)(vi). PCB Transformers that are not registered are not authorized for use and must be disposed of.

63 Fed. Reg. at 35,394. Region 2 focuses upon the first and last sentences of this excerpt, claiming that they evidence the intent of EPA to impose a definitive deadline for registering PCB

Transformers and to require removal or reclassification of any PCB Transformers not registered with EPA by that deadline.

Contrary to its claims, the position advanced by Region 2 is difficult to reconcile with the regulatory history of 40 C.F.R. § 761.30(a)(1)(vi). The second sentence of the excerpt upon which Region 2 relies plainly evidences EPA's intent to require the registration of any PCB Transformer in use or in storage for reuse, regardless of whether its owner had complied with the 1985 regulations by registering it with local fire response personnel. The first sentence, meanwhile, merely advises the public that the duty to register is a condition of EPA's authorization of the continued use of PCB Transformers. EPA later reiterates this guidance, stating, "Under § 761.30(a)(1)(vi)(D), the registration requirement will be a part of the authorization for continued use for each PCB Transformer." 63 Fed. Reg. at 35,394. First promulgated in 1998, 40 C.F.R. § 761.30(a)(1)(vi)(D), as noted above, provides that "[a] transformer owner must comply with [the registration requirement] to continue the PCB-Transformer's authorization for use, or storage for reuse...."

The foregoing statements in the preamble and the addition of 40 C.F.R. § 761.30(a)(1)(vi)(D) to the regulations suggest that EPA intended to codify the findings of the EAB in *Lazarus*, not depart from them. In analyzing the regulations as promulgated in 1985, the EAB noted that "[t]he transformer registration requirement is one of several conditions of EPA's authorization of the use of PCB Transformers" and that, "[u]nless the conditions for the transformer use authorization are complied with, the use authorization is inapplicable." *Lazarus*, 7 E.A.D. at 369-70. The EPA's statements in the preamble reiterate these findings. Furthermore, the structure of the regulations was not significantly or materially modified after *Lazarus* was decided. As they did in 1985, the regulations currently provide that "PCBs at any concentration may be used in transformers...subject to the following conditions." 40 C.F.R. § 761.30(a) (emphasis added). Those conditions, including the duty to register PCB Transformers, are still listed under a section of the regulations entitled "Use conditions." 40 C.F.R. § 761.30(a)(1) (emphasis added). The only notable difference is the addition of 40 C.F.R. § 761.30(a)(1)(vi)(D); however, that provision appears not to alter the thrust of the regulations as construed by the EAB in *Lazarus* but to codify the EAB's findings.

As for the last sentence of the excerpt, I find that it does not stand alone and apply to all PCB Transformers, as argued by Region 2. Rather, this sentence reasonably appears to qualify the sentence immediately preceding it and, accordingly, apply only to transferred PCB Transformers. Thus, when read together, the sentences instruct any person who takes possession of a transferred PCB Transformer to "assure that it was registered" and, if it was not registered, that it is "not authorized for use and must be

disposed of." This construction is supported by the absence of any language in the regulations stating that PCB Transformers not registered by December 28, 1998, are not authorized for use and must be removed from service or reclassified. Thus, contrary to Region 2's claims, I find that the excerpt of the preamble upon which Region 2 relies does not, in fact, lend support to its position in the instant matter.

Upon further review of the preambles to both the Proposed Rule and the Final Rule, the undersigned is hard-pressed to locate any statements that could reasonably be construed as evidencing an intent to modify the regulations in the manner advocated by Region 2. This absence is telling. As Region 2 conceded at oral argument, the only substantive differences between the registration requirement as promulgated in 1985 and the registration requirement as amended in 1998 are the substitution of "as of" with "no later than" and the modification of the entity with whom owners of PCB Transformers are required to register. Tr. at 8:18-19, 22-25 and 9:2-15. While EPA provides in the preamble to the Final Rule a thorough, detailed rationale for amending the regulation to establish a national registration program in place of the previous requirement to register only with local fire response personnel, no reference is made to the significance of the substitution of "as of" with "no later than" or to any intent to establish a definitive deadline for registration of PCB Transformers that precludes late registration. See 63 Fed. Reg. at 35,392-35,394; 59 Fed. Reg. at 62,837-62,838. This failure strongly suggests that the substitution was not material and that EPA did not intend for it to signal the dramatic departure from the EAB's interpretation of the registration requirement in *Lazarus* that Region 2 proposes.

Respondent points to evidence in the regulatory history that corroborates this view. In particular, Respondent relies upon the following statement in the preamble to the Proposed Rule that, according to Respondent, suggests that EPA drew no distinction between the "as of" and "no later than" language used in the 1985 and 1998 regulations, respectively:

[I]n order to qualify for the current use authorization, all PCB Transformers were required to have been registered with fire response personnel by December 1, 1985....

59 Fed. Reg. at 62,820 (emphasis added). A review of the regulatory history uncovers additional instances in which EPA describes the regulation as promulgated in 1985, which required PCB Transformers to be registered "as of December 1, 1985," as requiring owners of PCB Transformers to register the PCB Transformers with fire response personnel "by December 1, 1985." *E.g.* 50 Fed. Reg. at 29,170 (final rule establishing 1985 regulation); 63 Fed. Reg. at 35,392 (Final Rule) (emphasis added). Respondent contends that this reference demonstrates that EPA

viewed both the "as of" language of the 1985 regulation and the "no later than" language of the current regulation as establishing deadlines for registration of PCB Transformers and that, because EPA treated "as of" and "no later than" indistinguishably, *Lazarus* is not distinguishable. Region 2 does not respond to this contention in any of its filings or at oral argument. The undersigned finds Respondent's arguments to be persuasive. Furthermore, the Merriam Webster's Dictionary defines "by" as "not later than." Merriam Webster's Collegiate Dictionary 157 (10th ed. 1997). Thus, EPA's description of the 1985 regulation in the regulatory history suggests that EPA views the phrases "as of" and "no later than" as having the same meaning, which further undermines the significance Region 2 attributes to the substitution of "as of" with "no later than" in the current regulation.

To advance its position, Region 2 claims that its interpretation of 40 C.F.R. § 761.30(a)(1)(vi)(A) is consistent with Congress's intent in enacting Section 6(e)(2)(A) of TSCA to establish a permanent statutory prohibition on the use of PCBs. Region 2 contends that, once the owner of PCB Transformers fails to register the transformers by December 28, 1998, the authorization for use is inapplicable and the statutory prohibition applies. Region 2 then reasons that, because Congress intended for the statutory prohibition to be permanent, the unauthorized use of PCB Transformers is a continuing violation that cannot be remedied and does not cease until the PCB Transformers are removed from service or reclassified. The undersigned finds that, while the statutory prohibition on the use of PCBs is susceptible to the interpretation advocated by Region 2, this position is less reasonable than that of Respondent in light of the significant evidence in the record lending support to Respondent's interpretation of the current regulation.

Region 2 contends that its position is also consistent with the legislative history of TSCA. Region 2 observes that the legislative history reflects Congress's intent to authorize EPA to employ a variety of approaches to regulating chemicals under the statute, including outright prohibitions, and that imposing a definitive deadline for registration of PCB Transformers after which the prohibition on the use of PCBs becomes effective is an exercise of that authority. Region 2 is correct in asserting that the legislative history illustrates that Congress authorized EPA to enact outright prohibitions. However, the mere existence of that authority does not demonstrate that EPA necessarily exercised it here. Thus, the legislative history relied upon by Region 2 also fails to lend support to its position.

As Respondent points out, Region 2 cites no other authority to advance its interpretation of 40 C.F.R. § 761.30(a)(1)(vi)(A) as imposing a definitive deadline for registering PCB Transformers and requiring removal or reclassification of any PCB Transformers not

registered with EPA by that deadline.<sup>6/</sup> Respondent, on the other hand, cites numerous decisions issued by the EAB subsequent to the 1998 amendment of the registration requirement that employ the methodology adopted in *Lazarus* for determining whether the doctrine of continuing violations applies and favorably cite the holding of that case. Respondent argues that the EAB's reliance upon *Lazarus* in those decisions refutes Region 2's contention that *Lazarus* no longer applies. Respondent also refers to CAFOs recorded by Region 4 of EPA as demonstrating that Region 4 shares the view of Respondent that failure to register PCB Transformers by December 28, 1998, does not preclude subsequent registration and require reclassification or removal of the PCB Transformers from service. I agree that the EAB's decisions and Region 4's view of the regulations cast further doubt on the persuasiveness of Region 2's position in this proceeding.

Finally, I note that EPA permitted Respondent to register its PCB Transformers in 2005, more than six years after the promulgation of the current registration requirement at 40 C.F.R. § 761.30(a)(1)(vi)(A).<sup>7/</sup> At oral argument, Respondent also pointed out that the form designed by EPA for members of the regulated community to use in registering PCB Transformers still appears on the Agency's website and that, as evidenced by the database publicly available on the website, more than 2000 registration forms have been accepted since December 28, 1998. Tr. at 46:10-12, 47:10-16. While Region 2 claims that the form is available for the registration of only newly-discovered PCB Transformers, see Tr. at 20:19-22, I agree with Respondent that such practical considerations, while not dispositive in themselves, contravene Region 2's position.<sup>8/</sup>

---

<sup>6/</sup> The undersigned specifically asked counsel for Region 2 at the oral argument whether Region 2 had relied upon any guidance documents or directives not previously entered into the record in construing the regulation. Tr. at 26:18-20. Counsel for Region 2 denied relying upon any such documents. Tr. at 27:21-22 and 28:6-7. However, during rebuttal, counsel for Region 2 asserted, "EPA headquarters has made it clear that late registration is not permitted for PCB Transformers, and that under the 1998 rule, transformers must be removed." Tr. at 60:23-25 and 61:2. Counsel did not identify the specific source of this position.

<sup>7/</sup> I do not address the question of whether EPA's acceptance of Respondent's registration of its PCB Transformers constitutes equitable estoppel.

<sup>8/</sup> The distinction of banning owners of transformers that were identifiable as or assumed to be PCB Transformers in 1998 from registering those transformers after December 28, 1998, but allowing owners to register newly-identified PCB Transformers after  
(continued...)

In accordance with the foregoing discussion, I find that Region 2 failed to identify sufficient evidence in the record<sup>8/</sup> supporting its view that 40 C.F.R. § 761.30(a)(1)(vi) establishes a definitive deadline for the registration of PCB Transformers and that the continued use of a PCB Transformer not registered by that date results in the unauthorized use of the transformer, which constitutes a continuing violation that ceases only when the transformer is removed from service or reclassified. While the statutory prohibition on the use of PCBs could be implemented by EPA in the manner that Region 2 proposes, 40 C.F.R. § 761.30(a)(1)(vi) and its predecessor set forth deadlines for the registration of PCB Transformers but do not contain language explicitly imposing such an absolute ban on the use of transformers not registered by the dates prescribed therein. In analyzing the regulations as promulgated in 1985, the EAB held in *Lazarus* that the requirement to register PCB Transformers is continuing in nature and supports a continuing violation. *Lazarus*, 7 E.A.D. at 372. The EAB also stated, in dicta, that the ongoing violation of failure to register PCB Transformers ceases for statute of limitations purposes on the date the PCB Transformers are registered. *Id.* I must presume, therefore, that the EAB found nothing in the language of the 1985 regulations that required the removal or reclassification of PCB Transformers not registered by December 1, 1985.

Nothing in the text of the current regulations or the regulatory history suggests that, in amending the regulations in 1998, EPA intended to depart from the EAB's holding in *Lazarus* and establish an absolute ban on the use of any PCB Transformers not registered by December 28, 1998. Inasmuch as I now find that the regulations were not significantly or materially altered by the 1998 amendment, I too am compelled to find that Respondent's violation of unauthorized use of PCB Transformers for failure to register ceased on April 5, 2005, the date on which Respondent registered its PCB Transformers.<sup>10/</sup> Further, I observe that the

---

<sup>8/</sup> (...continued)  
December 28, 1998, is not particularly persuasive.

<sup>9/</sup> In rendering this Decision, I am restricted to considering the arguments raised by the parties in their pleadings and briefs and at oral argument. In other words, I am bound by the record before me.

<sup>10/</sup> Respondent asserts that, upon registering its PCB Transformers on April 5, 2005, it "instituted all the programs found by the EPA when it inspected the transformers some four years later, on May 7, 2009." R's PHE at 7. Region 2 relies upon this statement to contend that "Respondent did not maintain compliance with the PCB Transformer regulations, such as marking, inspection  
(continued...)

particular decisions of the EAB and CAFOS cited by Respondent, as well as such practical aspects as EPA's acceptance of Respondent's registration in 2005, are inconsistent with the position adopted by Region 2 in this proceeding.

Accordingly, I find that the language of the regulations, as informed by the regulatory history and the EAB's holding in *Lazarus*, imposes a duty to register PCB Transformers that is continuing in nature and supports a continuing violation and that the violation ceases upon registration of the PCB Transformers.<sup>11/</sup>

#### **E. Respondent's Liability for Counts 1 and 2 of the Complaint**

Having found that the doctrine of continuing violations applies here, I note that the five-year statute of limitations period began to run on April 5, 2005, once the violation ceased. The record 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. §§ 22.1-22.32, on the date it is received and stamped by the appropriate Hearing Clerk. Thus, the Complaint in this proceeding was filed on February 24, 2010.

Regardless of whether the date of service or the filing date are dispositive for statute of limitations purposes, Region 2 commenced this action prior to the expiration of the limitations period on April 5, 2010. Thus, Respondent is precluded from invoking the statute of limitations as a defense.

Region 2 alleges liability and seeks to assess a penalty for one day of violation, May 7, 2009.<sup>12/</sup> Pursuant to my finding that

---

<sup>10/</sup> (...continued)  
and record keeping, prior to April 2005 when transformers were registered." C's Br. at 18. Nevertheless, the Complaint does not charge Respondent with the unauthorized use of PCB Transformers on any basis other than failure to register its transformers.

<sup>11/</sup> Therefore, I need not address the issue of whether the revision to the regulatory language of 40 C.F.R. § 761.30(a)(1)(vi)(A) provides fair notice to Respondent of the import attached thereto by Region 2.

<sup>12/</sup> As noted above, the Complaint alleges that, as of the date of the Inspection on May 7, 2009, Respondent was using two PCB Transformers at its Facility. Compl. ¶¶ 14, 23. Based upon that  
(continued...)

---

(...continued)

use, the Complaint alleges that Respondent was engaged in the unauthorized use of PCB Transformers. Compl. ¶¶ 18, 27. While the Complaint does not specify the entire period in which Respondent allegedly engaged in the unauthorized use of PCBs, it proposes that a civil administrative penalty in the aggregate amount of \$33,500 be assessed against Respondent for the two counts of unauthorized use alleged. Compl. at 4. In its Prehearing Exchange, Region 2 contends that, because the unauthorized use of PCB Transformers constitutes a continuing violation that does not cease until the PCB Transformers are removed from service or reclassified, "Respondent is still in violation of the regulations." C's PHE at 11. Region 2 then specifies that the period of alleged violations for which it seeks a penalty is one day, May 7, 2009, the date of the Inspection. C's PHE at 11-12. Region 2 maintains its position in its Rebuttal Prehearing Exchange and Brief that the alleged violations began when Respondent failed to register its PCB Transformers on the date prescribed by 40 C.F.R. § 761.30(a)(1)(vi)(A) and continue to the present date, but Region 2 does not specify any other period of alleged violation for which it alleges liability and seeks a penalty.

At oral argument, however, Region 2 argues that the period of violation before the undersigned for adjudication is not merely May 7, 2009, but the entire period Respondent allegedly engaged in the unauthorized use of PCB Transformers, beginning December 28, 1998, and continuing until Respondent removes or reclassifies its PCB Transformers. Tr. at 24:19-21, 25:2-7. Region 2 claims that it selected May 7, 2009, merely as a point of reference for the Paperwork Reduction Act analysis but that "an action for penalty could be sustained by any day within the violation period." Tr. at 25:8-11, 19-24.

I find that Region 2 is precluded from raising such an argument at this stage in the proceeding. Assuming, *arguendo*, that the filing date of a complaint is dispositive for statute of limitations purposes, the statute of limitations bars Region 2 from assessing a civil penalty for violations prior to February 24, 2005. Thus, Region 2 could have sought a penalty for any day between February 24, 2005, and April 5, 2005, the date on which Respondent registered its PCB Transformers and the violation ceased. Had Region 2 stated earlier that it was seeking a penalty for a period of alleged violation that included any day within that window, I would not have scheduled oral argument. The parties agreed that no genuine issues of material fact existed. R's PHE at 1; C's Br. at 39. Thus, this matter would have been amenable to disposition by accelerated decision. However, Region 2 specifically limited the period of alleged violation to one day in its Complaint and Prehearing Exchange and did not clarify that  
(continued...)

Respondent's violation ceased on April 5, 2005, I conclude that Respondent's continued use of its PCB Transformers on May 7, 2009, did not constitute unauthorized use for failure to register its PCB Transformers or a failure or refusal to comply with 40 C.F.R. §§ 761.20 and 761.30(a)(1)(vi), in violation of Section 15(1)(C) of TSCA, 15 U.S.C. § 2614(1)(C). Thus, I find that Respondent is not liable for the violations alleged in Counts 1 and 2 of the Complaint.

#### IV. ORDER

For the reasons set forth above, Respondent is found not liable for either of the two Counts alleged in the Complaint. Accordingly, the Complaint is hereby dismissed.

Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order 45 days after its service upon the parties, unless a party moves to reopen the hearing under 40 C.F.R. § 22.28, an appeal is taken to the Environmental Appeals Board within 30 days of service of this Initial Decision pursuant to 40 C.F.R. § 22.30(a), or the Board elects to review this Initial Decision, sua sponte, as provided by 40 C.F.R. § 22.30(b).

---

Barbara A. Gunning  
Administrative Law Judge

Dated: March 8, 2011  
Washington, DC

---

(...continued)

position in any subsequent filings. Accordingly, I find that Region 2 is now bound by that selection.