

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR



U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG.11
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REGIONAL HEARING
CLERK

IN THE MATTER OF)
)
VALVO CONVENIENCE AND GAS, INC.,) DOCKET NO. RCRA-02-2011-7507
AND STEPHEN M. VALVO,)
INDIVIDUALLY,)
)
)
RESPONDENTS)

ORDER ON THE APPLICABILITY OF THE PAPERWORK REDUCTION ACT

On June 3, 2011, the United States Environmental Protection Agency, Region 2 ("Complainant," "EPA," or "Agency"), initiated this proceeding by filing a Complaint, Compliance Order and Notice of Opportunity for Hearing ("Complaint") against Valvo Convenience and Gas, Inc., and Stephen M. Valvo ("Respondents"). Respondents filed a joint Answer on July 12, 2011. Thereafter, the undersigned directed the parties by Order dated October 19, 2011, to engage in a prehearing exchange of information. In particular, Complainant was directed to submit, among other things, a statement concerning the applicability of the Paperwork Reduction Act ("PRA"), 44 U.S.C. §§ 3501-3521, to this proceeding.

Complainant subsequently asserted in its Prehearing Exchange that the PRA does not present a valid defense for Respondents. Respondents claim in their Prehearing Exchange, however, that the PRA applies and Complainant is therefore barred from imposing any penalty against Respondents. For the reasons set forth below, I agree with Complainant's position on this issue and reject Respondents' assertion of a defense under the PRA.

I. Statutory and Regulatory Background

Originally enacted in 1980, the PRA seeks to "minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government." 44 U.S.C. § 3501(1). To advance that goal, the PRA empowers the Office of Management and Budget ("OMB") to review and approve any "collection of information" proposed by a federal agency and, upon such approval, assign the collection of information a

control number. 44 U.S.C. §§ 3504, 3507. Additionally, the PRA contains the following "public protection" provision:

(a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this subchapter if-

(1) the collection of information does not display a valid control number assigned by the Director [of OMB] in accordance with this subchapter; or

(2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.

(b) The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.

44 U.S.C. § 3512(a), (b).

The PRA defines the term "collection of information," in pertinent part, as:

[T]he obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for . . . answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States

44 U.S.C. § 3502(3). The term "recordkeeping requirement" is defined, in turn, as:

A requirement imposed by or for an agency on persons to maintain specified records, including a requirement to (A) retain such records; (B) notify third parties, the Federal Government, or the public of the existence of such records; (C) disclose such records to third parties,

the Federal Government, or the public; and (D) report to third parties, the Federal Government, or the public regarding such records.

44 U.S.C. § 3502(13).

The PRA contains a number of exemptions. Primarily related to law enforcement and litigation, these exemptions are "designed to preserve traditional means of obtaining information during investigations and legal actions without requiring the involvement of OMB." *Zaclon, Inc.*, 7 E.A.D. 482, 492 (EAB 1998) ("*Zaclon*"). Of particular relevance to the present proceeding, Section 3518 of the PRA exempts agency enforcement activities from coverage under the statute:

[T]his subchapter [the PRA] shall not apply to the collection of information-

* * *

(B) during the conduct of . . . (ii) an administrative action or investigation involving an agency against specific individuals or entities.

44 U.S.C. § 3518(c)(1)(B)(ii).

Consistent with this statutory exemption, the regulations promulgated by OMB to implement the PRA provide:

(a) The requirements of this Part apply to all agencies . . . and to all collection of information . . . but . . . shall not apply to collections of information:

* * *

(2) during the conduct of . . . an administrative action, investigation, or audit involving an agency against specific individuals or entities;

* * *

(b) The requirements of this Part apply to the collection of information during the conduct of general investigations or audits . . . undertaken with reference

to a category of individuals or entities such as a class of licensees or an entire industry.

(c) The exception in paragraph (a)(2) of this section applies during the course of the investigation, audit, or action, whether before or after formal charges or complaints are filed or formal administrative action is initiated, but only after a case file or equivalent is opened with respect to a particular party. In accordance with paragraph (b) of this section, collections of information prepared or undertaken with reference to a category of individuals or entities, such as a class of licensees or an industry, do not fall within this exception.

5 C.F.R. § 1320.4(a)(2), (b), (c).

II. Arguments of the Parties

In its Prehearing Exchange, Complainant argues that the public protection provision set forth at 44 U.S.C. § 3512 applies only to violations involving recordkeeping requirements and that the seven counts in the Complaint do not concern any such requirements. Complainant's Prehearing Exchange ("C's PHE") at 16-17. Complainant further contends that "the PRA defense is not available to Respondents, as the provisions these counts allege were violated constitute substantive requirements that do not implicate the concerns of Section 3512, and for these counts, Respondents are not being charged with a paperwork violation." C's PHE at 17-18. Accordingly, Complainant maintains, the PRA does not present a valid defense for Respondents.

In turn, Respondents argue in their Prehearing Exchange that certain correspondence sent by Agency personnel to Respondent Stephen M. Valvo ("Respondent Valvo")^{1/} "show[s] expressly that

^{1/} Specifically, Respondents refer to the following documents: a Request for Information Pursuant to Section 9005 of the Solid Waste Disposal Act, as amended, letter ("Information Request Letter") dated December 21, 2007; a letter dated January 8, 2010, in which Agency personnel notify Respondent Valvo that his response to a "Proposed Expedited Enforcement Compliance Order and Settlement Agreement," previously issued to him for violations identified at Respondent Valvo Convenience & Gas, Inc.'s facility, was overdue; an Information Request Letter dated May 10, 2010; a

(continued...)

these are Requests for Information." Respondents' Prehearing Exchange ("Rs' PHE") at 2 (citing CX^{2/} 17-23). Claiming that the letters "were arguably the basis for the [Complaint]," Respondents point out that they did not display a valid control number assigned by OMB. *Id.* at 5. Additionally, Respondents contend that, contrary to Complainant's assertions, the counts in the Complaint involve recordkeeping requirements. *Id.* Pointing to certain paragraphs of the Complaint as support for this claim, Respondents argue that the public protection provision therefore applies in this proceeding and the penalty sought by Complainant should be dismissed with prejudice. *Id.*

Citing the statutory and regulatory authority for the Information Request Letters, Complainant contends in its Rebuttal Prehearing Exchange that those documents were "part of EPA's ongoing investigation of possible noncompliance by Respondents with the underground storage tank regulations" and are therefore "exempt from OMB review" pursuant to Section 3518 of the PRA, 44 U.S.C. § 3518, and the implementing regulations at 5 C.F.R. § 1320.4(a)(2). Complainant's Rebuttal Prehearing Exchange ("C's Rebuttal PHE") at 2. Accordingly, Complainant asserts, the author of the December 21, 2007 Information Request Letter stated therein that the letter was not subject to the PRA. *Id.* at 3.

In response, Respondents point out in their Sir-Rebuttal [sic] Prehearing Exchange that "none of the . . . Requests for Information indicated that these documents were being served upon the Respondents as part of an administrative action or a formal investigation." Respondents' Sir-Rebuttal Prehearing Exchange

^{1/} (...continued)
 letter dated June 7, 2010, in which Agency personnel grant Respondent Valvo's request for an extension of time to respond to the May 10, 2010 Information Request Letter; a letter dated August 10, 2010, in which Agency personnel notify Respondent Valvo that his response to the May 10, 2010 Information Request Letter was overdue; a Notice of Violation letter, dated September 23, 2010, pertaining to Respondent Valvo's failure to respond to the May 10, 2010 Information Request Letter; and a Notice of Violation letter, dated December 16, 2010, pertaining to Respondent Valvo's alleged violation of regulations governing underground storage tank systems.

^{2/} For purposes of this Order, proposed exhibits submitted by Complainant as part of its Prehearing Exchange will be referred to as "CX."

("Rs' Sir-Rebuttal PHE") at 2. Therefore, Respondents contend, "the EPA should have obtained a valid control number" for the documents and "the protections set forth in Section 3512 of the PRA are applicable in this action." *Id.*

III. Discussion

While Respondents contend that the regulations at issue in this proceeding involve recordkeeping requirements, contrary to the position advanced by Complainant in its Prehearing Exchange, Respondents do not argue that Complainant is barred from imposing a penalty under the PRA on the grounds that the recordkeeping requirements allegedly contained in the regulations failed to display a valid control number assigned by the OMB. Rather, Respondents maintain that the above-described letters issued to Respondent Valvo by Agency personnel fail to display such a number. Thus, Respondents treat those documents as the "collection of information" presently at issue.

As pointed out by Respondents, the letters in question do not display a valid OMB control number, nor do they inform Respondent Valvo that a response was not necessary in the absence of such a number. The Information Request Letters dated December 21, 2007, and May 10, 2010, state, however, that those documents are not subject to the requirements of the PRA. CX 17, 19. Complainant argues that the Agency issued the Information Request Letters to Respondent Valvo as part of an ongoing investigation of Respondents' compliance with applicable regulations. Therefore, Complainant contends, the Information Request Letters are exempt from the requirements of the PRA pursuant to 44 U.S.C. § 3518(c)(1) and the implementing regulations at 5 C.F.R. § 1320.4(a)(2).

I agree with Complainant's position and find that each letter cited by Respondents is exempt from the requirements of the PRA pursuant to the provisions relied upon by Complainant. As previously recounted, these provisions establish an exemption from coverage under the statute for the collection of information during the conduct of an administrative actions or investigations against specific individuals or entities. 44 U.S.C. § 3518(c)(1); 5 C.F.R. § 1320.4(a)(2). The Environmental Appeals Board ("EAB") has observed, "The legislative history suggests to us that the exemption for administrative actions and investigations applies to traditional agency enforcement activities, such as inspections, targeted information requests,

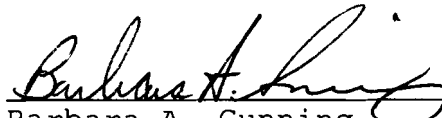
subpoenas, summonses, and litigation activities, such as pleadings and discovery." *Zaclon*, 7 E.A.D. at 493.

In considering the applicability of the exemption to a letter requesting the submission of a RCRA permit application, the EAB noted that collections of information found to fall within the exemption, such as summons issued by the Internal Revenue Service in conjunction with tax investigations and document requests for audit purposes, "were for the specific purpose of determining the recipients' compliance with certain legal obligations." *Zaclon*, 7 E.A.D. at 493-94 (citing *United States v. Saunders*, 951 F.2d 1065, 1067 (9th Cir. 1991); *United States v. Particle Data, Inc.*, 634 F.Supp. 272, 275 (N.D. Ill. 1986); *Phillips Petroleum Co. v. Lujan*, 963 F.2d 1380, 1387 (10th Cir. 1992); *Shell Oil Co. v. Babbitt*, 945 F. Supp. 792, 807 (D. Del. 1996), *aff'd*, 125 F.3d 172, 177 (3d Cir. 1997)). The EAB distinguished the letter at issue in *Zaclon* from the summonses and audits, finding that the letter did not suggest that the respondent's compliance with RCRA was under investigation or that an adversarial relationship existed between the respondent and the Agency. *Id.* at 494. Rather, the EAB determined that the letter was merely the first step in the Agency's permitting process. *Id.* Accordingly, the EAB held that the letter was not subject to the exemption for administrative enforcement actions and investigations. *Id.*

Like the summonses and audits cited by the EAB in *Zaclon*, the letters at issue in the present proceeding reflect that Respondents' compliance with the regulations governing underground storage tanks was subject to an ongoing investigation by the Agency. As the first Information Request Letter issued to Respondents, dated December 21, 2007, states, "Recently in conversations with Paul Sacker of my staff, you indicated that [there] are underground storage tanks (USTs) at the above site. You further indicated that these USTs have been placed in temporary closure." CX 17. As the temporary closure of underground storage tanks triggers certain regulations, Valvo that inspections of related facilities "indicated possible

violations of the federal underground storage tanks (USTs) regulations." CX 19.

For the foregoing reasons, the letters in question are deemed to be part of a compliance investigation against Respondents and are therefore exempt from the requirements of the PRA pursuant to 44 U.S.C. § 3518(c)(1) and the implementing regulations at 5 C.F.R. § 1320.4(a)(2).^{3/} Accordingly, Respondents' arguments on this issue are hereby rejected. As the parties have completed their prehearing exchange of information, this matter will be scheduled for hearing in a forthcoming Order.


Barbara A. Gunning
Administrative Law Judge

Dated: February 7, 2012
Washington, D.C.


^{3/} Even if the PRA were found to apply to the letters cited by Respondents, the "public protection" provision established by Section 3512 of the PRA, 44 U.S.C. § 3512, provides that "no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this subchapter [the PRA]" The Complaint does not charge Respondents with the failure to comply with the requirements of those letters. Thus, Respondents would be precluded from availing themselves of this defense.

In the Matter of Valvo's Convenience and Gas, Inc., and Stephen M. Valvo, Individually Respondent.

Docket No. RCRA-02-2011-7507

CERTIFICATE OF SERVICE

I hereby certify that true copies of this **Order on Applicability of the Paperwork Reduction Act**, issued on February 7, 2012, by Barbara A. Gunning, Administrative Law Judge, in Docket No. RCRA-02-2011-7507, were sent to the following parties on this 7th day of February 2012, in the manner indicated:



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Dated: February 7, 2012
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