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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:)	
)	
AutoAlliance International, Inc.)	Docket No. 5-
EPCRA- 98- 023)	
)	
Respondent,)	

Order on Respondent's Motion for Accelerated Decision
Related to the Paperwork Reduction Act

This is a proceeding under Section 325(c) of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA" or "Act"), 42 U.S.C. Section 11001 *et seq.*, involving nineteen counts, each alleging a violation of Section 313 of EPCRA. This Order addresses the Respondent's (AutoAlliance) ("AA") Motion for Accelerated Decision based on asserted EPA violations of the Paperwork Reduction Act ("PRA") (44 U.S.C. § 3501 *et seq.*).⁽¹⁾ For the reasons which follow, Respondent's Motion is DENIED.

Each of the Counts pertains to documentation required to be maintained in connection with a report known as Form R, the Toxic Chemical Release Inventory Reporting Form. See 40 C.F.R. Section 372.30. The 1991 version of Form R was approved by the Office of Management and Budget under OMB control number 2070-0093. All of the Counts pertain to documentation required for calendar year 1992. The Form R's for 1992 were due on or before July 1, 1993 and, for each of the Counts, the Form R was duly submitted in a timely manner. Under 40 C.F.R. 372.10(a), supporting documentation for any given year must be maintained for three years from the date of that year's submission. Under such facts Respondent would be obligated to keep the specified documentation until July 1, 1996. EPA asserts that Respondent refused to supply the required documentation when requested during May 4th and 5th 1994 inspections of its facility.

In a nutshell, Respondent's position is that the requirement to maintain the supporting records in issue in this case is a requirement of 40 C.F.R. § 372.10 and that this regulation constitutes an information collection request. As such, according to Respondent, the regulation is subject to the PRA. From this, AA argues that EPA failed to obtain the required Office of Management and Budget ("OMB") approval on the theory that, while OMB Control No.2070-0093 covers the reporting requirements of 40 C.F.R. § 372.30 and the Form R described there, that control number does not cover the recordkeeping requirements for §372.10 nor, consequently, the forms or information sought by EPA in this proceeding.

Alternatively, AA maintains that, even if OMB Control Number 2070-0093 does capture the reporting requirements of §372.10, EPA still failed to properly display the number in the Federal Register ("Fed. Reg.") or the Code of Federal Regulations (C.F.R.), contrary to OMB requirements that the number be displayed in both, or failed to include a valid disclaimer for the information requests, as required by 44 U.S.C. § 3512 and 5 C.F.R. 1320.5(a) 1994.

In its June 24, 1999 Response, EPA argues, on two grounds, that the PRA does not apply, asserting that all requirements approved by OMB under Control No. 2070-0093 are exempt from the PRA, and additionally that the PRA regulations exempt "administrative investigations" of a party from 5 C.F.R. Part 1320.

In support of the first ground, EPA points to the following language from the 1993 Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act:

Notwithstanding the Paperwork Reduction Act of 1980 or any requirements thereunder the Environmental Protection Agency Toxic Chemical Release Inventory Form R and instructions, revised 1991 version issued May 19, 1992, and related requirements (OMB No. 2070-0093), shall be effective for reporting under section 6607 of the Pollution Prevention Act of 1990 (Public Law 101-508) and section 313 of the Superfund Amendments and Reauthorization Act of 1986 (Public Law 99-499) until such time as revisions are promulgated pursuant to law.

Pub. L. No. 102-389, 106 Stat. 1602.

EPA maintains that related recordkeeping may be implicitly included as part of an information collection requirement. 5 C.F.R. § 1320.7(q). (Currently found at 5 C.F.R. 1320.3(c)(1)) The recordkeeping under 40 C.F.R. § 372.10, it asserts, is such a related requirement of Form R reporting and, accordingly, also covered under OMB No. 2070-0093. It is a related requirement, EPA maintains, because a reporting requirement implicitly includes recordkeeping to permit the agency to determine the accuracy or completeness of the reported information in order to assess compliance determination.

Further, EPA notes that it included recordkeeping as part of the reporting burden when it sought OMB's approval for the Section 313 reporting in December 1987, as reflected at Line 18.3 of Standard Form 83, "Request for OMB Review," and in the accompanying supporting statement that this included the requirement to "[d]evelop and maintain files on reports and notices submitted." As noted by EPA, OMB's original approval under Control No. 2070-0093 adopted the Agency's estimated number of hours for recordkeeping when it approved the total annual burden of compliance for the section, an approval that was repeated when EPA sought renewal of the Control Number in September 1990.

Apart from whether such recordkeeping qualifies as supportive documentation to the Form R reporting, EPA also maintains that, by the language quoted in the above cited Appropriations Act, Congress exempted Form R and its related requirements from the PRA in any event. In support of this, EPA points to the unequivocal language employed in the quoted section⁽²⁾ and presents case law authority for the

position that Congress may direct suspension of a law using the vehicle of an appropriations bill. Given that Congress specifically identified that control number in the cited Appropriations Act as exempted from the PRA requirements, all related requirements are similarly exempted. This, EPA points out, is consistent with common sense, as a requirement that a facility must report information but not maintain records which support the claims made in the reports would put the reliability of the reports at risk.

Responding to AA's other argument, EPA asserts that, even though exempt from the PRA's display requirements, it satisfied them anyway. In this regard, EPA, pointing to the Environmental Appeals Board's ("EAB" or "Board") recent decision in EK Associates, L.P., CAA Appeal No. 98-4, slip op., June 22, 1999, (EK Assoc.) for the proposition that such a tabular display notice through a technical amendment is adequate form of display for PRA purposes, it notes that the OMB number in issue was published in the Federal Register as a technical amendment on June 23, 1993 (58 Fed. Reg. 34, 198) and that this then appeared in the 1993 C.F.R. in a table within 40 C.F.R. Part 9 as well as the C.F.R. volume containing Part 372. EPA Memorandum at 11. That publication met the requirements set forth in EK Assoc., since one searching for a technical amendment displaying a control number for Part 372 reporting would have found the OMB control number, 2070-0093, as covering the Form R reporting of Part 372.

Last, EPA argues that under the PRA regulations, collections of information, such as that sought by the EPA's inspection, are exempt from the PRA itself. In this regard EPA observes that 5 C.F.R. § 1320(c) exempts information collection when made as part of an administrative action or investigation. Here, the investigation was initiated by April 21, 1994, at which time the EPA official was seeking to conduct a "Data Quality Audit." EPA also notes that the Board has held in Zalcon, Inc., 1998 EPA App. LEXIS 13, that the PRA exemption applies to inspections and targeted information requests. EPA Memorandum at 14.

Respondent filed a Reply Memorandum on July 12th and a Surreply on August 9, 1999. In the former, AA continues its arguments as to the proper interpretation of the Appropriations Rider, whether OMB actually included recordkeeping in issuing Control Number 2070-0093, whether there was a proper display in any event, and whether the enforcement exemption was applicable. In the latter, AA takes issue with various aspects of EPA's July 27th Response. All arguments were duly considered.

In its July 27th Response to Respondent's Reply Memorandum, EPA addresses cases cited by AA in which the effect of employing the phrase "notwithstanding any provision of law" was given a narrow construction by courts. EPA notes that, in contrast to the cases cited by AA, there is no indication of any legislative intent to restrict the customary import of the phrase, and that the appropriations rider specifically referred to the PRA, as opposed to a reference applying generally to any provision of law.

On several independent grounds⁽³⁾, the Court denies AA's Motion. First, it agrees that, in using the language employed in the Appropriations Rider, Congress did clearly exempt the subject control number from the requirements of the PRA. Given that use of the term "notwithstanding" is equivalent to stating "In spite of the fact," the Court agrees that the use of that word and the associated phrase emphasizing its effect, plainly conveys an intent to exempt Form R from the PRA. Further, the Court also agrees with EPA's position that Congress may amend substantive law in an appropriations act. See Robertson v. U.S. Forest Service, 503 U.S. 429, 440. (1992).

The Court also agrees that related recordkeeping is implicitly included within the requirement of Form R reporting. It is self-evident that a reporting requirement inherently carries with it the duty to maintain documents which support the claims made with the Form R filings. To hold otherwise would tempt human nature beyond its capability, and make a mockery of the reporting duty. In addition, independent of the determination that there was an exemption from the PRA display requirements, the Court finds that, consistent with the Board's recent decision in EK Assoc., there was adequate display of the subject OMB Control Number.

Finally, again independent of the other determinations in this Order, the Court agrees with EPA's position that the information sought to back up the claims made with the Form R's is exempt from the PRA as part of an administrative action or investigation. 5 C.F.R. § 1320 could not be more clear in providing that collections of information during the conduct of an administrative action or investigation are exempt from the requirements of the PRA. While the PRA has salutary purposes, it was not intended to operate as a shield by preventing agencies from verifying the accuracy of information submitted by businesses.

So Ordered.

William B. Moran
United States Administrative Law Judge

Dated: September 16, 1999

1. Unfortunately, the parties have continued a practice that began at the outset of this litigation, of filing Replies, Responses to Replies, and Surreplies to Motions. The Court assumes responsibility for allowing this. Henceforth the parties are advised that only a Response to a Motion will be permitted, absent a showing of compelling reasons for submission of a Reply. A party seeking to demonstrate such compelling reasons may only submit the reasons in support of granting such a Motion *and shall not* submit the actual Reply until the Court has first issued an Order granting the Motion.

2. EPA maintains that use of the phrase "Notwithstanding the Paperwork Reduction Act" in the cited legislative provision as well as its coupling with the phrase "or any requirements thereunder," clearly signaled Congress' intent that Form R and its related requirements were exempted from the PRA.

3. Although not raised by the parties, it also appears to the Court that, beyond the reasons given in the body of this Order, the Respondent's Motion may also be rejected on the basis that the supporting documentation, being statutorily based,

is outside of the PRA in any event. As noted by the United States District Court for the District of Utah, Northern Division, in Gossner Foods Inc. v. EPA, 918 F.Supp. 359, 1996 U.S. Dist. LEXIS 2777, March 5, 1996, the PRA is inapplicable to information required explicitly by statute. Thus, where an information requirement originates with Congress, the reporting duty is wholly independent of EPA's obligations under the PRA. It appears that, consistent with the District Court's observation in Gossner that the information sought there was due independently of Form R, so too 42 U.S.C. §11023 (g)(2), by its nature, contemplates supportive data to substantiate the information required by §11023 (g)(1), the provision which anticipated the development of Form R by the Administrator.

In the Matter of AutoAlliance International, Inc., Respondent
Docket No. 5-EPCRA-98-023

CERTIFICATE OF SERVICE

I certify that the foregoing **Order on Respondent's Motion for Accelerated Decision Related to the Paperwork Reduction Act**, dated September 16, 1999 was sent this day in the following manner to the addressees listed below:

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Dated: September 16, 1999



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