UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
MOBAY CORPORATION	)	Docket No. TSCA-III-605
	)	
Respondent	)	

Order Denying Motion For An Accelerated Decision

Respondent Mobay Corporation is charged with numerous violations of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601 - 2692, and the applicable regulations. The violations charged include the following:

1. The importation of new chemical substances without submitting to the EPA at least 90 days before such importation a notice of the person's intent to import in violation of TSCA § 5(a)(1), 15 U.S.C. § 2604(a)(1), and of the regulations set forth in 40 C.F.R. Part 720. A "new chemical substance" is a chemical substance not included on the list of chemical subatances which the EPA is required under the Act to compile (hereafter referred to as the "EPA Inventory").[1]

2. Falsely certifying that chemical substances Mobay has imported into the United States comply with all applicable rules and orders under TSCA. The certification is required by United States Custom Service, Department of Treasury regulation, § 12.121, to implement TSCA, §13, 15 U.S.C. 2612, which prohibits the entry

[1] TSCA, § 3(9), 15 U.S.C. 2602(9).

into the United States of chemical substances that are not in compliance with TSCA and any rule or order issued thereunder.

3. Failing to include in the notice reporting the importation of a new chemical substance all the information required by EPA regulation, 40 C.F.R. §720.45.

4. Including false information in the notice required by 40 C.F.R. § 720.102 of commencement of manufacture or of import of a new chemical substance.

5. Including false information on the TSCA inventory form that was required to be submitted by 40 C.F.R. § 710.3.

The complaint contains 424 Counts and a penalty of $4,704,000, is requested.[2]

Mobay now seeks an accelerated decision dismissing 384 of the Counts on the grounds that they are barred either by the five-year statute of limitations provided in 28 U.S.C. § 2462, or by the Paperwork Reduction Act ("PRA"), 44 U.S.C. §§ 3501-3520, or by both. Finally, Mobay has submitted the affidavit of an expert that many of the chemical substances which are the subject of this complaint were not new chemical substances but simply had different chemical names then identical chemicals on the EPA's Inventory.

Genuine Issues of Material Fact Exist With Respect to Whether Any of the Counts are Barred by the Statute of Limitations.

In the case of 3M Company (Minnesota Mining and Manufacturing) v. Browner, 17 F. 3d 1453 (D.C. Cir 1994), reh'g and suggestion for

[2] The Complaint originally contained 427 Counts, but three counts, 425, 426 and 427, for which the EPA requested a penalty of $51,000, have been drooped.

reh'g in banc denied (May 9, 1994), the court held that proceedings for the assessment of civil penalties under TSCA, § 16(a), 15 U.S.C. § 2615(a), were subject to the five-year statute of limitations in 28 U.S.C. § 2462. That statute reads as follows:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

The complaint is alleged to have been filed on July 3, 1991.[3] Thus, all violations alleged to have occurred prior to July 3, 1986, are claimed to be now barred. Mobay has listed these violations, claimed to total 317 in all, in its brief.[4] They consist of alleged failure to file the premanufacture notification, alleged false import certifications and allegedly filing false inventory forms.

3M Company, like this case, involved the alleged importation of unreported new chemical substances. The violations occurred between August 1980 and July 1986, and were discovered by the EPA in 1986, when 3M notified the EPA about the importations. In 1988 EPA filed its administrative complaint. The court held that the EPA may not assess civil penalties against 3M Company for violations committed more than five years before the EPA issued its

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[3] Respondent's Motion for Accelerated Decision at 15. Actually, the date-time stamp on the complaint shows that it was filed with the Regional Hearing Clerk on July 1, 1991. For purposes of this motion, however, the July 3 filing date is accepted.

[4] Respondent's Brief at 11-12, and Attachment 1.

complaint. It rejected the contention that the claim should have been considered as accruing when the EPA was first notified about the importations which would have brought all imports within the five-year period and subject to civil penalties.[5] Issues not specifically addressed by the court were whether the importation of a new chemical without filing a notice could be considered a continuing violation until the notice was filed, although the court was skeptical about there being a continuing violation on the facts before it, and whether the statute could be tolled by fraudulent concealment.[6]

In order to put Mobay's and the EPA's arguments in proper context, it is worthwhile to examine TSCA briefly against the background of its pertinent legislative history.

A major problem that TSCA was intended to deal with was the potential risk to health and environment created by introduction of new chemicals into the marketplace each year and subsequently into the environment through use and disposal. Past experience had shown how toxic to humans and the environment could be chemicals such as newly developed plastics which had come into wide use.[7]

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[5] 3M Company, 17 F3d at 1460 - 1463.

[6] 3M Company, 17 F. 3d at 1455, n. 2 and 1461, n.15. The EPA did not rely upon the doctrine of a continuing violation. Id. at 1455, n. 2.

[7] This, of course, is stated in the Act's statement of Findings, Policy and Intent, TSCA, § 2, 15 U.S.C. § 2601. See also, Sen. Rep. 94-968, 94th Cong. 2d Sess. 3-6, reprinted in House Committee on Interstate and Foreign Commerce, Legislative History of the Toxic Substances Control Act, Prepared by the Environmental and Natural Resources Policy Division of the Library of Congress (Comm. Print 1976) (hereafter "Legislative History") at 159-162; H.

Premanufacture notification was regarded as an important feature of the Act.[8] In reporting the bill to Congress, for example, it was stated:

> The most effective and efficient time to prevent unreasonable risks to public health or the environment is prior to first manufacture. It is at this point that the costs of regulation in terms of human suffering, jobs lost, wasted capital expenditures, and other costs are lowest.[9]

Premanufature notification carries out this Congressional purpose by enabling the EPA to make a reasoned evaluation of the health and environmental effects of a new chemical substance before it is actually introduced into the marketplace and into the environment.[10]

What is clear from the Act and its legislative history is that the Act imposes upon the manufacturer, which is the importer in

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R. Rep. 94-1341, 94th Cong. 2d Sess. 3-7, Legislative History at 411-415.

[8] See e.g. the following statement of Senator Tunney, a sponsor of the bill: "The existence within S.3149 of a strong premarket screening process is a key factor in the effective operation of this legislation. We can no longer operate under the assumption that what we do not know about a chemical substance cannot hurt us." Legislative History at 215.

[9] S. Rep. 94-698, 94th Cong. 2d Sess. 5 (1976), Legislative History at 161. See also Conference Report, H. R. Rep. 94-1679, 94th Cong. 2d Sess. 65 (1976), Legislative History at 678.

[10] See Tsca, §§ 5 and 6, 15 U.S.C. §§ 2604, 2605, dealing with the regulatory action the EPA may take where the information given to the EPA or available to it is found to be insufficient to permit the EPA to make a reasoned evaluation of the health and environmental effects of a chemical substance or where the EPA finds on the information available to it that there is a reasonable basis to conclude that the chemical substance will present an unreasonable risk of injury to health or the environment. See also Legislative History at 740 (Remarks of Senator Magnuson in connection with Senate's consideration of Conference Report).

this case, the affirmative duty to report the intended importation of a new chemical 90 days before it is imported. The statute prescribes specific information about the chemical substance that is to be reported and other information is required by regulation.[11]

It is also clear from the Act, and from the record in this case, that the chemical identity and molecular structure and other information about the chemical substance can be trade secrets, the confidentiality of which is zealously guarded by the importer.[12] This, of course, is material to the question of whether the EPA would have any other access to this information than that reported by the importer.

Finally, although the court in 3M Company, held that the date of importation was the date on which the claim accrued, it is clear that there are really two elements to the violation, the filing of the notification and the subsequent importation of the chemical. If a new chemical substance is to be imported, TSCA imposes an affirmative duty on the importer to first notify the EPA, and the importation is prohibited until the notification with the required

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[11] TSCA § 5(d) and § 8(a)(2)(a), 15 U.S.C. §§ 2604(d), 2607(a)(2)(A); 40 CFR § 720.40 and Appendix A to Part 720.

[12] Pursuant to the claim of business confidentiality made by Mobay, in accordance with the provisions of TSCA and the regulations, all information that could identify the chemical substances, and the quantities imported have been classified as "confidential business information." See TSCA, § 14, 15 U.S.C. 2613; 40 C.F.R. § 720.85. The unauthorized disclosure of such information is subject to stringent sanctions. TSCA § 14(d), 15 U.S.C. § 2613(d).

information has been filed.[13]

It is with the above considerations in mind, that we turn to the EPA's claim that the statute has been tolled because the proper information was either intentionally withheld or negligently not disclosed to the EPA, or because the violation continued until the notification was filed.

The doctrine of fraudulent concealment as tolling the statute of limitations is an equitable one and appears to have been applied mainly, if not entirely, in civil causes of action.[14] That, of course, is not material here, since this is a civil proceeding and the court in 3M Company expressly recognized that the statute of limitations could be tolled by fraudulent concealment.[15] The rationale for the doctrine has been stated to be that, given that the purpose of the statute of limitations is fairness to defendant, who should not be called upon to defend a suit where the evidence

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[13] As Senator Magnuson, Chairman of the Senate Committee on Commerce, stated in connection with the Senate's consideration of the conference report (H.R. 94-1679), "The requirements of the act are clear. If this information [required by Section 5(d)] is not properly submitted, then the notification requirements of the act have not been complied with. Manufacture or processing may not begin until 90 days - or 180 days, if extended - after proper notification has been given." Legislative History at 740.

[14] The case cited as the leading case on the subject, Holmberg v. Armbrecht, 327 U. S. 392 (1946) was a civil action to enforce the liability imposed upon shareholders of a land bank equal to one hundred percent of their holdings. The cases cited by the parties are all civil actions.

[15] 3M Company 17 F. 3d at 1461, n.15. An administrative proceeding to assess a civil penalty is a precursor to an action to collect the penalty, if the penalty is not paid. Such action is a civil proceeding. United States v. Ward, 448 U.S. 242 (1980).

has been lost, memories have faded and witnesses disappeared, the most common and justifiable exception to the running of the statute is based upon the affirmative acts of the defendant which have impeded suit.[16]

The EPA has produced the affidavits of former Mobay employees indicating that Mobay was knowingly giving incorrect or incomplete information to the EPA about the chemical substances it was importing into the United States. Mobay attacks the credibility of these employees, but Mobay has not shown that these individuals would not be in a position to have knowledge of facts relevant to the submission of incorrect information to the EPA. The EPA also cites other evidence indicating a disposition on the part of Mobay to withhold information about its chemicals from the EPA or to misrepresent Mobay's compliance with the notification requirements of TSCA.

Mobay seeks to counter the EPA's evidentiary showing by questioning the credibility of the EPA's witnesses and by its own explanation of what inferences are properly drawn from the evidence. In order to defeat a motion for an accelerated decision,

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[16] Smith v. American President Lines, Ltd., 571 F. 2d. 102, 109, n. 12 (2d Cir. 1978); see also, Holmberg v. Armbrecht, 327 U.S. 392, 397 (19460:

> [W]here a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." (quoting Bailey v. Glover 21 Wall (US) 342, 348, 22 L ed 636, 638.

however, the EPA need only show that there are genuine issues of material fact about whether the statute of limitations should be tolled by Mobay's incorrect or incomplete reporting.[17] I find that the EPA has met this burden. Nor should Mobay's burden be overlooked. As the moving party, it must show that there is no genuine dispute of material fact. Mobay's analysis depends upon drawing inferences from the evidence favorable to its contentions but it is well established that the rule is to the contrary, and that the inferences most favorable to the party opposing an accelerated decision should be drawn from the supporting documents in determining the existence or not of genuine issues of fact.[18]

Mobay also argues that the EPA in order to prevail on its claim of fraud must show by clear and convincing evidence that Mobay intended to conceal evidence from the EPA. The cases cited by Mobay, however, deal with the tolling of the statute in antitrust cases. One obvious distinction that comes to mind is that in those cases there was no clear-cut statutory duty to report information that the agency was to rely upon in fulfilling its statutory obligations, a consideration that could bear not only on what constitutes "fraudulent" concealment of the violations but also on the EPA's diligence, or want thereof, in discovering the

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[17] See Adickes v. Kress & Co., 398 U.S. 144, 157-160 (1970).

[18] 6 JAMES WM. MOORE et al., MOORE'S FEDERAL PRACTICE ¶ 56.15(3) at 56-255 (2d ed. 1994).

violations.[19] Since the facts as to Mobay's conduct are yet to be established, it would not be useful to attempt to determine whether they make out a case for tolling the statute.

The EPA also argues that the statute of limitations did not run because the violations were continuing. This question had not been decided by the court in 3M Company, because the EPA had not made it a basis for its decision, although the administrative law judge had found the violations continuing in an interlocutory decision in the case.[20] Mobay points out that this issue should not be revisited because the EPA did not adopt it as a basis for its decision and that the case of Toussie v. United States, 397 U.S. 112 (1970) is dispositive of the issue, as the court in 3M Company indicated in its opinion. There is, however, a significant distinction between Toussie and this case. Toussie involved the failure of a person to register for the draft within five days after reaching his 18th birthday as required by the Selective Service Act of 1948. He was not indicted for failure to register

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[19] Mobay argues that the EPA cannot satisfy the requirement that it have acted with diligence because the customs officials were negligent in allowing these chemical substances to be imported without having complied with TSCA. I find that there are genuine issues of fact with respect to both whether the EPA should be charged with any asserted lack of diligence by customs officials and whether customs officials can be charged with lack of diligence. The court in 3M Company thought that there might be some significance in the fact that the EPA after 3M's violations required that the certification filed with customs on importation be sent to the EPA. 17 F. 3d at 1461, n. 15. This statement, however, was by way of dictum, and the relevancy of the EPA's procedures with customs will undoubtedly be explored at the hearing.

[20] 3M Company, 17 F. 3d at 1455, n.2.

until 1970. The Supreme Court held that the indictment was barred by the five-year statute of limitations applicable to non-capital criminal offenses. The Court found that the violation was complete upon Toussie's failure to register within 5 days of his reaching draft age. It does not appear that the Selective Service Act contained language similar to that found in TSCA, § 16(a)(1), 15 USC § 2615(a)(1), that "[e]ach day such a violation continues shall, for the purposes of this subsection, constitute a separate violation of § 15...."

Mobay argues that the language applies only to the assessment of a penalty, and not to the violation which is complete upon importation. An answer to this argument is that this is precisely what this proceeding is about, namely, the assessment of a penalty. Moreover, Mobay's interpretation leaves open the question of whether continuing penalties can be assessed against wrongful importations, if, as Mobay assumes, the violation is complete upon importation. The construction that more accords with Congress' intent as manifested in the Statute and the underlying Congressional history is that the violation consists of the importation without filing a notification, and continues until the notification is filed. The importation is the initial step in the introduction of the chemical into the marketplace and the risk to health and environment remains until the information enabling an evaluation of its potential toxicity becomes known.[21]

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[21] C.f., United States v. ITT Continental Baking Co., 420 US 223 (1975). In that case, brought under the Federal Trade Commission and Clayton Acts, the Supreme Court held that the

Nevertheless, the EPA did not adopt Judge Frazier's decision in 3M Company, that the violations were continuing or press the issue before the court of appeals.[22] Under these circumstances, I believe that if the issue is to be reconsidered, it should be done by the Environmental Appeals Board. I am not convinced that any of the arguments made here were not already considered by the Chief Judicial Officer (predecessor to the Environmental Appeals Board), who by his silence seemed to find little merit in the claim that the violations continued and kept the statute from running.

No Counts Have been Shown to Barred as a Matter of law by the Paperwork Reduction Act

Mobay argues that 200 violations are barred by the EPA's failure to comply with the Paperwork reduction Act of 1980, as amended ("PRA"), 44 U.S.C. §§ 3501-3520. This includes 45 counts for unlawful importations occurring between March 15, 1982 and January 1, 1984 and 155 counts for false certifications filed

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continued holding of assets acquired in violation of a consent order that prohibited, only the acquisitions of assets was a "continuing failure or neglect to obey the order" within the applicable civil penalty statutes, 15 USC § 21(1) and 15 USC § 45(1). The Court noted that the continuing failure or neglect to obey provisions "were intended to assure that the penalty provisions would provide a meaningful deterrence against violations whose effect is continuing and whose detrimental effect could be terminated or minimized by the violator at some time after initiating the violation."

[22] See Mobay's reply to Complainant's memorandum in opposition to Respondent's motion for accelerated decision, p. 42, and Attachment 4; 3M Company, 17 F. 3d at 1455, n. 2.

between January 1, 1984 and July 1, 1986.[23]

The facts on this issue are not disputed. PRA, which went into effect on December 31, 1981, requires that agency information collection requests, which includes report forms and reporting requirements, are to be submitted to the Director of the Office of Management and Budget ("OMB") for approval.[24] The key provision on which Mobay relies is § 3512, which provides as follows:

> Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to an agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter.

OMB assigned control number 2000-0054 to the notice form used between 1979 and 1983. Notification of OMB approval and the assignment of a control number was given in the Federal Register.[25] Between December 31, 1981 and October 26, 1983, however, the control number was not displayed on or with the form in either the Federal Register or the Code of Federal Regulations. Thus, Mobay's arguments turn on what constitutes compliance with the requirement

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[23] Motion for Accelerated Decision, Attachment 1. According to Mobay, the period during which the notices did not comply with the requirements of the PRA ran from December 31, 1981 through October 26, 1983, and, since the notice was an information request with respect to Mobay's importations, Mobay cannot be penalized for importations from March 31, 1982 (90 days after December 31, 1981) through January 24, 1984 (90 days after October 26, 1984). Motion for Accelerated Decision at 22.

[24] PRA, §§ 3502, 3507.

[25] 47 Fed. Reg. 1168, 1169 (1982).

of the PRA that the OMB control number be displayed.[26]

The certification form was never assigned an OMB control number, because during the period involved here it was never submitted to OMB for approval.

With respect to Mobay's objections based on the notice's asserted noncompliance with PRA requirements, the definitive answer is that the notice itself and specific information to be contained therein were by Statute made a prerequisite to any importation and, therefore, were not subject to the Paperwork Reduction Act.

TSCA § 5(a)(1), 15 U.S.C. § 2604(a)(1), prohibits a person from manufacturing (which by definition includes "importing") a new chemical substance unless at least 90 days before such importation the importer submits "a notice in accordance with subsection (d) of this section" of the person's intent to import.

TSCA § 5(d), 15 U.S.C. 2604(d), provides that in addition to other information the notice shall include insofar as known to the person, or is reasonably ascertainable, the information described in subparagraphs (A), (B), (C), (D), (F) and (G), of TSCA § 8(a)(2), 15 U. S.C. § 2607(a)(2). The information described in these provisions is as follows:

(A) The common or trade name, the chemical identity,

[26] Mobay asserts that the OMB control number for the PMN Form (2000-0054) was not current between April 30, 1982 and December 20, 1982. The document Mobay cites for this statement, Attachment 3 to its motion, is inconclusive on how the dates shown therein support Mobay's statement. In the EPA's final rule establishing notice requirements, effective July 12, 1983, there is no reference to any lapse of OMB control number 2000-054 in the discussion of the applicability of the PRA to the notice requirements. See 48 Fed. Reg 21741 (May 13, 1983).

and the molecular structure of each chemical substance or mixture for which such a report is required.

(B) The categories or proposed categories of use of each substance or mixture.

(C) The total amount of each substance and mixture manufactured or processed, reasonable estimates of the total amount to be manufactured or processed, the amount manufactured or processed for each of its categories of use, and reasonable estimates of the amount to be manufactured or processed for each of its categories of use or proposed categories of use.

(D) A description of the byproducts resulting from the manufacture, processing, use, or disposal of each substance or mixture.

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(F) The number of individuals exposed, and reasonable estimates of the number who will be exposed, to such substances or mixture in their places of employment and duration of such exposure.

(G) In the initial report under paragraph (1) on such substance or mixture, the manner or method of its disposal, and in any subsequent report on such substance or mixture, any change in such manner or method.

The legislative history makes it clear that submission of the above information was not dependent upon the EPA requiring it by rule. Thus, it is stated in the Conference Report:

> The conference substitute requires the notice required to include certain information described in section 8 (a) (Reporting and Retention of Information) whether or not the Administrator has required its submission under that section....[27]

In sum, the notification containing the specific information

[27] H.R. Rep. No. 94-1679, 94th Cong. 2d Sess. 67, Legislative History at 680. See also Senator Magnuson's statement during Senate consideration of the Conference Report, " Section 5 (d) of the statute explicitly states that the notice must include certain specific information. This includes the name, identity and molecular structure of the chemical...." Legislative History at 740.

described in the Statute is not an "agency information request" but a statutorily mandated direction to supply information when new chemical substances are to be imported.

Mobay argues that the EPA is charging only a failure to file the notification required by rule, but the complaint cites both the notice required by statute and by rule.[28]

Mobay's construction of the Paperwork Reduction Act as permitting importations unless the notification has received OMB approval is also in error. It is true that the importation of a new chemical substance is conditioned upon giving proper notification. But Mobay's assumption that the PRA was an amendment to TSCA's restrictions on the importation of new chemicals is wrong. The Act protects a person only against having to comply with information requests that could be unnecessarily burdensome. To construe noncompliance with the PRA as sanctioning the importation of chemical substances not reported to the EPA is a draconian result that stretches the PRA beyond its intended scope of keeping agency information requests within reasonable bounds, and is directly contrary to Congress' intent in enacting TSCA.[29] As was stated by

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[28] Complaint, ¶ 3.

[29] It is, of course, recognized that an importer faced with a form that has not complied with PRA requirements and which the importer regards as unreasonably burdensome could be faced with the dilemma of either abstaining from importing the chemical or filling out the form. That is not the situation here where the notice had been approved by OMB as a reasonable information collection request but the approval had not been displayed on the form. In any event, one course of action open to the importer is to give only the notification required by statute, leaving for determination the consequences of not supplying the additional information required by agency rule. While the alternative, abstaining from importing

the court when a party invoked the PRA to escape its statutory obligation to file an income tax return:

> Congress enacted the PRA to keep agencies, including the IRS, from deluging the public with needless paperwork. It did not do so to create a loophole in the tax code.[30]

The EPA also argues that the PRA, prior to its amendment by the Paperwork Reduction Reauthorization Act of 1986, did not apply to collection of information requirements in existing regulations. Before promulgation of the final rule, effective July 12, 1983, premanufacture notification requirements had been handled under an Interim Policy.[31] The EPA's position has support in the administrative interpretation of the Act.[32] On the other hand, Mobay's position, that this administrative interpretation should be

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the chemical, may seem like a harsh result, TSCA and its legislative history make clear that a new chemical should not be introduced into the workplace and environment unless the EPA has first been given the opportunity to evaluate its potential for harm to health and the environment. Supra at 4-6.

[30] United States v. Hicks, 947 F 2d 1356, 1359 (9th Cir. 1991). Mobay seeks to distinguish this case and other cases involving criminal convictions for failure to file tax returns on the ground that they involve "frivolous" PRA arguments. It is not at all clear, however, that that was the basis for the court's decision in Hicks. In that case it appears that for one of the four tax years the OMB control number was not displayed on the regulations associated with Form 1040, and for all four years, the expiration date was omitted from the tax form, the associated regulations and instruction books. The court did not address these defects because it found it unnecessary to reach the question of whether the IRS had failed to comply with the PRA. Hicks, 947 F 2d at 1359.

[31] See preamble to final rule and notice form, 48 Fed. Reg. 21722, 21723 (May 13, 1983)

[32] Memorandum for Michael W. McConell, Assistant General Counsel, OMB from Robert B. Shanks Deputy Assistant Attorney General, Office of Legal Counsel, dated Sep 24, 1984 (EPA Exhibit 14); Preamble to final OMB regulations, 48 Fed. Reg. 13666, 13671 (March 31, 1983).

given no weight because contrary to Congress' intent in passing the PRA has support both in the legislative history, and in Congress' subsequent amendment to clarify the Act by making it applicable to all collection of information requirements imposed by agencies.[33] Even if the administrative interpretation were accepted, it is not clear from the EPA's argument that the EPA's Interim Policy would qualify as a notice and comment rule under the administrative interpretation.

The EPA also makes the argument that the notification of OPM approval and the assignment of a control number in the Federal Register for January 11, 1982, met the requirement that the OPM control number be "displayed."[34] The Act requires that the information collection request "display a current control number."[35] The OMB regulations required that the OMB control number be printed on the front page of the form and if the collection of information is published in a regulation, in the text of the published regulation.[36] There is support for the EPA's argument

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[33] Mobay's Reply to Complainant's Memorandum in Opposition at 55-59.

[34] For the Federal Register notification see 47 Fed. Reg. 1169 (Jan 11, 1982).

[35] 44 U.S.C. § 3512. The wording has remained the same since the enactment of the Paperwork Reduction Act of 1980. Pub. L. No. 96-511, § 2(a), 94 Stat 2822 (1980).

[36] 5 C.F.R. § 1302.7(f) as published in 48 Fed. Reg. 13691 (Mar 31, 1983). The final regulations did not become effective until May 2, 1983. 48 Fed. Reg. 13666 (Mar 31, 1983). Nevertheless, Mobay contends that these requirements were applicable from the effective date of the PRA.

in an opinion given by the Acting General Counsel of OMB.[37] That opinion, however, is based upon the rule that publication in the Federal Register is constructive notice of the contents and it is arguable whether that rule should be applied to display of the OMB control number in view of the obvious purpose of the Statute to inform the public of OMB approval.[38]

Since I have found that notification providing the information required by statute is not subject to the PRA, and that, in any event, noncompliance with the PRA does not confer upon the person a license to import a new chemical without giving notification, it is not necessary to decide these other arguments.

The certifications which Mobay is charged with falsely filing are required by regulations of the United States Customs Service, Treasury.[39] The importer must certify to the district director at the port of entry that all chemical substances in a shipment comply with all applicable rules and orders under TSCA or that the chemicals are not subject to TSCA by signing a statement to that effect.[40]

Under OMB regulations certifications are not generally

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[37] Letter from Robert G. Damus, Acting General Counsel, OMB, to Gerald H. Yamada, Acting General Counsel, EPA, dated May 28, 1993, EPA Exhibit 22.

[38] A different result might follow if notwithstanding the fact that the OMB control number was not displayed, a person had actual notice of the OMB approval. Mobay's actual notice, however, has not been made an issue here.

[39] 19 CFR §§ 12.118-12.127.

[40] 19 CFR § 12.121.

considered information, the collection of which is subject to the PRA, "provided they entail no burden other than necessary to identify the respondent, the date of the respondent's address, and the nature of the instrument.[41] Mobay argues, however, that signing the certification requires on its part the burden of determining whether the chemicals in its shipment are subject to TSCA and, if so, whether these chemicals are included on the TSCA Chemical Substance Inventory. Mobay is required by statute to make precisely those determinations. It may regard compliance with TSCA as burdensome, but this is not the kind of burden that the PRA was intended to protect against. Consequently, the EPA's position that the TSCA certification required by Customs does not need an OMB control number, a position which is supported by rulings from both OMB and the Customs Service, appears to be the correct one.[42] This interpretation is not inconsistent with the statute and the language in the regulation addressed to whether the certified statement constitutes the "collection of information" is sufficiently ambiguous that the agency's construction is a permissible construction of the regulation and of the statute.[43]

Even if the certification were considered "information" requiring an OMB control number, this still would not excuse giving a false certification, which, contrary to what Mobay asserts, is

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[41] 5 CFR §1320.7(j)(1).

[42] See EPA Exs. 17, 18 and 19.

[43] Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-843 (1984).

specifically what the complaint has charged here.[44]

Genuine Issues of Fact Exist as to Whether Several Chemicals Were on the TSCA Inventory When They Were Imported.

Relying upon the definition of a chemical substance in TSCA, § 3(2)(A), 15 U.S.C. 2602(2)(A), as "any organic or inorganic substance of a particular molecular identity", Mobay argues that it was not required to file a notification for the imports being questioned since they were polymers having the same molecular identity as chemicals already on the inventory even though they did not have the same chemical names. According to the affidavit of Mobay's expert, Dr. Jean Frechet, a polymer is a chemical substance composed of repeating molecular units and the molecular identity of a polymer is determined by the final structure of its repeating molecular units.[45]

The EPA claims that whether or not a polynomer is a new chemical substance that must be reported depends not only on the identity of its final structure of repeating molecular units but also on the identity of its starting monomers and other reactants and of its manufacturing processes. This is supported by the EPA's

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[44] See United States v. Matsumoto, 756 F. Supp. 1361, 1365 (D. Hawaii 1991) (Failure of visa application to have OMB control number does not protect against intentionally furnishing false information.) By way of dictum, the court in Matsumoto indicated that the PRA may protect persons who make good faith mistakes in supplying information in response to a noncomplying information request. 756 F. Supp. at 1365. Mobay also cites legislative history that would support such an interpretation. Whether Mobay's certifications were made inadvertently in good faith or with an intent to conceal the true identity of the chemical are facts to be determined at the hearing.

[45] Motion for Accelerated Decision, Ex. 7, ¶¶ 11, 12.

long-standing interpretation of TSCA.[46] It is also supported by the affidavit of the EPA's expert, Dr. Timothy Swager, that the production process can affect the molecular weight of the polynomer, which, in turn, can affect its toxicity.

It is also not clear from Dr. Frechet's affidavit as to precisely what he means by molecular identity in defining the identity of the chemical itself.[47] As Dr. Swager points out, the term molecular identity has no specific meaning in polymer chemistry but depends upon its context. In short, whether molecular identity is in itself a sufficient basis for determining the identity of Mobay's chemicals with those already on the Inventory is an issue on which the facts still have to be developed.

Further, the EPA's showing that the constituent monomers and the production process can affect the toxicity of a chemical detracts from Mobay's claim that TSCA does not require the reporting of a chemical if it has the same final structure of repeating molecular units notwithstanding that it has a different name and has been manufactured from different monomers and under a different process. Such an interpretation is contrary to TSCA's

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[46] For example, since 1977, the EPA has required that in reporting polynomers, the person must also report the constituent monomers used at greater than 2 percent (by weight) in the manufacture of a polynomer. 40 C.F.R. § 710.5(c). This requirement has been present since 1977. See 42 Fed. Reg. 64578 (Dec 23, 1977).

[47] TSCA requires that the manufacture report the common or trade name, the chemical identity and the molecular structure. TSCA § 8(a)(2)(A). Dr. Frechet disputes the significance of the chemical name, but it cannot be told from his affidavit how pertinent the examples he cites are to the chemicals at issue here. Again, this is an issue which the EPA is entitle to explore at a hearing on the facts.

purposes as set out in the statute and in the legislative history.

In sum, I find that there are genuine disputes of material fact as to whether the asserted similarity in molecular identity between the chemicals at issue and those on the Inventory dispensed with the requirement that the importation of those chemicals be reported.

Accordingly, Mobay's motion for an accelerated decision is denied.

Gerald Harwood

Gerald Harwood
Senior Administrative Law Judge

Dated: March 1 ,1995

In the Matter of Mobay Corporation, Respondent
Docket No. TSCA-III-605

Certificate of Service

I certify that the foregoing **Order Denying Motion For An Accelerated Decision**, dated March 1, 1995, was sent this day to the following.

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Dated: March 1, 1995