IN RE ZACLON, INC.

RCRA (3008) Appeal No. 96-1

REMAND ORDER

Decided January 30, 1998

Syllabus

The United States Environmental Protection Agency Region V appeals an initial decision that dismissed the Region's complaint against Zaclon, Inc. based on the public protection provision of the Paperwork Reduction Act ("PRA"), 44 U.S.C. § 3512.

The Region issued a RCRA complaint against Zaclon alleging a violation of 40 C.F.R. section 270.1(c) due to Zaclon's failure to submit a RCRA part B post-closure permit application or equivalency demonstration for a closed waste pile at Zaclon's facility in Cleveland, Ohio. After the Presiding Officer issued an accelerated decision on liability but prior to a penalty hearing, Zaclon raised the issue of a PRA defense. In the initial decision, the Presiding Officer held that the PRA barred assessment of any penalty against Zaclon because EPA had failed to display an Office of Management and Budget ("OMB") control number in the regulatory text of 40 C.F.R. § 270.1(c).

The Region appealed from this decision, arguing: 1) that Zaclon waived the PRA defense by failing to include the defense in its answer or an amended answer; 2) that the PRA defense is not available to Zaclon because the PRA's administrative enforcement exemption to the PRA applies to this case; and 3) that an OMB control number was properly displayed for 40 C.F.R. § 270.1(c) during the time period at issue in this case.

HELD:

1) Zaclon's late assertion of the PRA defense did not result in a waiver of that defense. The Region did not establish that the proceedings were unduly delayed or that it was prejudiced as a consequence of the Presiding Officer's decision to allow the PRA defense to go forward.

2) The PRA's administrative enforcement exemption is not applicable to this case because the part B permit application or equivalency demonstration was not requested of Zaclon in the context of an investigation or enforcement action.

3) The Board does not find it necessary to address the parties' arguments regarding display of an OMB control number for 40 C.F.R. § 270.1(c) because the collection of information associated with the mandatory portion of the regulation violated is found at 40 C.F.R. § 270.14. An OMB control number for section 270.14 was unambiguously displayed during the time period in question in this case.

The initial decision is reversed and the case remanded to the Presiding Officer for assessment of an appropriate penalty.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge McCallum:

The United States Environmental Protection Agency Region V appeals an initial decision dismissing the Region's complaint against Zaclon, Inc. Administrative Law Judge Spencer T. Nissen ("Presiding Officer") held that the public protection provision of the Paperwork Reduction Act ("PRA"), 44 U.S.C. §§ 3501-3520, bars assessment of a penalty in this case.

In December 1991, the Region issued a complaint under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k, against Zaclon alleging a violation of 40 C.F.R. section 270.1(c). The alleged violation arose out of Zaclon's failure to submit a RCRA part B post-closure permit application or equivalency demonstration for a closed waste pile at Zaclon's facility in Cleveland, Ohio. Zaclon's principal argument in its defense was that the post-closure permit procedures were not applicable to Zaclon. In September 1992, the Region and Zaclon both moved for accelerated decision as to Zaclon's liability. The Presiding Officer issued an order on cross-motions for accelerated decision on October 6, 1993, finding that the regulation requiring owners and operators of closed hazardous waste units, including waste piles, to obtain post-closure permits did apply to Zaclon. The Presiding Officer reserved the determination of penalty amount for further proceedings. Order on Cross-Motions for Accelerated Decision at 20.

A penalty hearing was scheduled for November 9, 1994. One week prior to the hearing, Zaclon submitted a supplemental pre-hearing exchange suggesting that the Paperwork Reduction Act prohibits assessment of a penalty in this case. The Region responded by filing a motion in limine to exclude evidence pertaining to the PRA. At the hearing, the Presiding Officer indicated that he would reserve judgment on the Region's motion in limine and accept PRA evidence pending his decision on the motion. He also noted that he would reopen the hearing for further review of PRA evidence if warranted. Hearing Transcript ("Tr.") at 6 & 146.

The parties filed post-hearing briefs and reply briefs in January and February 1995, respectively. Both parties presented arguments and exhibits pertaining to the PRA in the course of this briefing. The Presiding Officer's initial decision, issued March 19, 1996, denied the Region's motion in limine and held that the PRA precludes assessment of any penalty against Zaclon. Initial Decision at 21-22. The Presiding

Officer thus dismissed the complaint against Zaclon. The Region's appeal of the Presiding Officer's penalty determination followed.

I. *INTRODUCTION*

A. *Factual and Procedural Background*

In 1987, Zaclon purchased a chemical manufacturing facility located in Cleveland, Ohio, from E.I. duPont de Nemours & Company ("DuPont"). When DuPont was the owner and operator of the facility, it maintained a waste pile, consisting of a concrete pad surrounded by concrete walls, used to treat hazardous waste generated during production processes. With the advent of RCRA permitting requirements, DuPont submitted part A of the RCRA permit application and obtained interim status for the facility and the waste pile.[1]

In 1985, DuPont prepared a closure plan for the waste pile. Both Ohio EPA ("OEPA") and U.S. EPA Region V approved the closure plan in October 1986. Closure activities were conducted and OEPA and Region V sent letters to DuPont certifying closure in March and April 1987, respectively. The Region's letter specifically noted that the "facility still has 'interim status' for the units that underwent closure and subsequently, is still subject to the corrective action requirements as outlined in the Hazardous and Solid Waste Amendments (HSWA) of 1984." Letter from Hak K. Cho, Acting Chief, Technical Programs Section, United States Environmental Protection Agency Region V, to D.E. Shimp, Senior Supervisor, E.I. duPont de Nemours and Company (received Apr. 15, 1987) ("Cho letter"). The Cho letter also indicated that the Region would be conducting a visual site inspection within six months.

Zaclon purchased the facility with the closed waste pile from DuPont in June 1987. The purchase agreement between DuPont and Zaclon contained a disclosure regarding the former waste pile and the

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[1] RCRA section 3005(a) requires owners and operators of hazardous waste treatment, storage, or disposal facilities to have a permit. 42 U.S.C. § 6925(a). However, a facility in existence on November 19, 1980, that notifies EPA of its hazardous waste activities and submits a permit application may continue to operate as though a permit has been issued until the Agency makes an official determination on the permit application. 42 U.S.C. § 6925(e). This situation is termed "interim status." *Id*.

The RCRA permit application process consists of two parts. *See* 40 C.F.R. § 270.1(b). Submission of part A of the permit application (and a notification of hazardous waste activities) allows an existing facility to operate under interim status. *Id*. Part B of the permit application is used by the permitting authority in making the final permit determination for a particular facility. The due date for part B is set by the Regional Administrator. Existing facilities must receive at least six months notice of the deadline for submission of the part B permit application. *Id.*

status of the agencies' closure approvals. Upon acquisition of the facility, Zaclon did not reopen the waste pile or operate any other regulated hazardous waste units at the facility.[2] In June 1988, Region V conducted the site inspection promised in the Cho letter and found "no evidence of significant releases at this facility." Robert E. Swale, Geological Engineer, United States Environmental Protection Agency Region V, Visual Site Inspection Report (July 8, 1988). The report concluded that "[n]o further action is required at this time." *Id*.

During the same time period as the closure activities, certifications, and follow-up inspection at Zaclon's facility, EPA was promulgating regulations to implement the 1984 Hazardous and Solid Waste Amendments ("HSWA") to RCRA. The amended statute requires that certain RCRA standards for new hazardous waste land disposal units such as waste piles must also apply to corresponding interim status units. RCRA § 3005(i), 42 U.S.C. § 6925(i). The particular standard relevant to this case is the requirement for post-closure permits at waste piles unless the owner/operator can demonstrate that the waste pile meets requirements for closure by removal or decontamination. 51 Fed. Reg. 10,706, 10,716 (Mar. 28, 1986) (proposed rule); 52 Fed. Reg. 45,788, 45,795 (Dec. 1, 1987) (final rule; codified at 40 C.F.R. § 270.1(c)). The preamble to the final rule clarified that the obligation to obtain a post-closure permit applied to units that closed while under interim status. 52 Fed. Reg. at 45,794. The rule also applied retroactively to units that had received wastes anytime after July 26, 1982, or had not certified closure by January 26, 1983. *Id*. at 45,795. The substantive requirements of the rule and its retroactive applicability were reviewed and upheld in *American Iron and Steel Inst. v. United States EPA*, 886 F.2d 390, 402 (D.C. Cir. 1989). The effect of the rule on Zaclon was to impose additional regulatory obligations for the waste pile at its facility that had already closed.

The final rule requires owners and operators of closed hazardous waste land disposal units, including waste piles, to obtain a post-closure permit or submit an "equivalency demonstration" requesting a determination from the Agency that the unit meets the requirements for closure by removal or decontamination. *See* 52 Fed. Reg. at 45,795; 40 C.F.R. §§ 270.1(c)(5) & (6). If the equivalency demonstration is accepted by the Agency, no post-closure permit or post-closure care activities are required. 52 Fed. Reg. at 45,795. An equivalency demonstration may be submitted at any time, up to and including when the Region "calls in" (*i.e.*, requests) a part B permit application for a post-closure permit. *Id*. However, the preamble warns that "the process of

[2] Zaclon's president testified that Zaclon does not have any RCRA permits or plans to obtain RCRA permits for the facility in the future. Tr. at 121-122.

demonstrating equivalency of closure will not affect the due date of a [p]art B application once it has been requested." *Id*. The due date for a part B permit application is set by the Regional Administrator, who must notify the facility of the obligation to submit an application at least six months in advance of the due date. *See* 40 C.F.R. § 270.1(b). Zaclon did not take any steps following promulgation of the December 1, 1987 regulations to submit an equivalency demonstration in advance of receiving a permit application call-in letter from the Region.

On September 20, 1990, Region V sent a permit application call-in letter to Zaclon, formally requesting submission of a part B post-closure permit application for the closed waste pile. Letter from William E. Muno, Acting Associate Division Director, Office of RCRA, Environmental Protection Agency Region V, to John A. Svadba, Site Services Manager, Zaclon, Inc. (Sept. 20, 1990) ("September 20, 1990 letter"). The letter referenced the December 1, 1987 regulations and described the optional equivalency demonstration process. The letter specified that either a post-closure permit application or an equivalency demonstration was due within six months. The letter was apparently received by Zaclon but placed in a file at the facility and consequently, no response was submitted within the appointed time.[3]

The Region filed a complaint against Zaclon in December 1991, seeking $81,100 in administrative penalties and a compliance order mandating that Zaclon submit a part B post-closure permit application or equivalency demonstration for the closed waste pile. Zaclon submitted an equivalency demonstration to the Region in June 1992. The equivalency demonstration was approved by the Region in September 1992. In the order on cross-motions for accelerated decision, the Presiding Officer held that Zaclon was liable for the failure to submit a permit application or an equivalency demonstration in accordance with the schedule set forth in the September 20, 1990 letter. In a footnote to that order, however, the Presiding Officer expressed skepticism regarding the amount of the Region's proposed penalty:

> Because Zaclon submitted an equivalency demonstration after this action was filed, which has been accepted by the Agency, there was no harm or potential harm to the environment. Rather the only harm, if any,

[3] Zaclon's president testified that he first became aware of the September 20, 1990 letter after receipt of the complaint in this matter. Tr. at 123. Upon receipt of the complaint, the September 20, 1990 letter was discovered in a RCRA file at the facility. The president stated that the letter was dated at about the same time that Zaclon hired a new environmental manager, an individual who was subsequently terminated for unsatisfactory performance prior to service of the complaint in this action. *Id*. at 124-125.

> is to the regulatory program, which seemingly does not warrant a penalty of the magnitude sought.

Order on Cross-Motions for Accelerated Decision at 20 n.15.

Shortly before the scheduled penalty hearing, the Region filed a motion to amend its complaint for the sole purpose of reducing the proposed penalty amount to $37,600. Subsequently, Zaclon filed a supplemental pre-hearing exchange, which introduced PRA issues into this action for the first time. The Presiding Officer ultimately ruled that the PRA bars any penalty in this action. On appeal, the Region requests that we reverse the decision of the Presiding Officer with regard to the PRA and remand this matter for a penalty assessment.

B. *Issues on Appeal*

The Region makes three principal arguments regarding the application of the PRA defense in this case. First, the Region argues that the Presiding Officer incorrectly held that EPA failed to properly display an Office of Management and Budget ("OMB") control number on 40 C.F.R. section 270.1(c), the regulation calling for post-closure permits for certain hazardous waste units that closed while under interim status unless closure by removal is demonstrated. Second, the Region argues that the PRA defense is not applicable here because this case falls within the administrative enforcement exemption in the PRA. Finally, the Region asserts that Zaclon waived the PRA defense because it was not pled in Zaclon's answer or in an amended answer. The Agency claims that it was prejudiced by the timing and manner in which Zaclon raised the PRA defense.

Our analysis of the Region's appeal begins with a brief review of the PRA and its public protection provision. We then address the arguments pertaining to waiver, the administrative enforcement exemption, and display of an OMB control number in turn.

II. *DISCUSSION*

A. *The Paperwork Reduction Act*

The Paperwork Reduction Act was enacted in 1980[4] in response to the increasing burden of federal paperwork requirements. The primary purpose of the PRA is to "minimize the Federal paperwork burden for

[4] Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (originally codified at 44 U.S.C. §§ 3501-3520). The original statute was amended via the Paperwork Reduction
Continued

individuals, small businesses, State and local governments, and other persons." 44 U.S.C. § 3501(1). The OMB serves as the federal government's paperwork watchdog. The PRA directs OMB to review all federal agency paperwork requirements, with limited exceptions.[5] In the PRA, paperwork requirements subject to the OMB review process are referred to as "collections of information":

> [T]he term "collection of information" means the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for * * *
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> > (A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons * * *[.]

44 U.S.C. § 3502(4). The particular vehicle through which an agency actually collects information is termed an "information collection request" ("ICR"):

> [T]he term "information collection request" means a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information * * *[.]

44 U.S.C. § 3502(11).[6]

Reauthorization Amendments of 1986, Pub. L. No. 99-500, § 101(m), 100 Stat. 1783-335 & Pub. L. No. 99-591, § 101(m), 100 Stat. 3341-335. Citations throughout this opinion are to the PRA as it appeared in the U.S. Code after the 1986 amendments.

The PRA was overhauled in many respects by the Paperwork Reduction Act of 1995 ("1995 PRA"), Pub. L. No. 104-13, 109 Stat. 163 (presently codified at 44 U.S.C. §§ 3501-3520). The 1995 PRA postdates the events at issue in this matter and therefore plays no part in our analysis.

[5] The PRA has broad coverage by design. The legislative history indicates that the PRA was intended to revise the paperwork clearance process under the Federal Reports Act of 1942, which was riddled with exemptions for various agencies and types of data collection. S. Rep. No. 96-930, at 13 (1980). The principal exemptions to the PRA's requirements are found at 44 U.S.C. § 3518(c). The exemption pertaining to administrative enforcement activities is discussed in this decision *infra* Section II.C.

[6] The term "information collection request" was eliminated in the 1995 PRA in favor of using the term "collection of information" to describe both the information gathering activity and the actual request vehicle. *See* H. Rep. No. 104-37, at 36 (1995). We use both terms in this decision, however, consistent with the version of the statute and regulations that apply to this matter.

Agencies are obligated to submit their ICRs to OMB for review prior to using them for collection of information from the public. 44 U.S.C. § 3507(a). Upon review, OMB will either approve or disapprove the ICR. 44 U.S.C. § 3507(b). If approved, OMB will assign a control number "to be displayed upon the [ICR]." 44 U.S.C. § 3507(f).

There is no direct mechanism in the PRA to ensure that regulatory agencies actually submit their ICRs to OMB and display control numbers as required by the statute. However, the so-called "public protection provision" provides a strong incentive for agencies to comply with the PRA:

> Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any 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 [of OMB], or fails to state that such request is not subject to this chapter.

44 U.S.C. § 3512. Thus, the public protection provision impinges on an agency's ability to enforce its regulations if the agency has not satisfied the mandates of the PRA. The PRA gives the public a potential defense, wholly apart from the merits of the allegations, in actions for assessment of penalties. The PRA's legislative history explains that operation of the public protection mechanism was intended to be uncomplicated and triggered by a lack of "display":

> Public participation should also play a policing role in maintaining agency compliance with the legislation. Section 3512, entitled "Public Protection" states that any collection of information which does not display a control number can be ignored by the respondent without penalty for failure to comply.

S. Rep. No. 96-930, at 17 (1980).

Given the importance of display in the statutory scheme, it is somewhat surprising that the PRA does not contain a definition of display. However, the issue of display was addressed by the Board in *In re Lazarus, Inc.*, 7 E.A.D. 318 (EAB 1997), the Board's first decision interpreting and applying the PRA. Our analysis of display in the context of this matter is presented *infra* Section II.D. First, however, we examine the Region's preliminary arguments on waiver and the administrative enforcement exemption.

B. *Waiver*

We addressed the issue of waiver of the PRA defense in *Lazarus*, 329-335. In *Lazarus*, we noted that the PRA defense has been identified as an affirmative defense by the courts and therefore must be pled. In addition, under the rules governing EPA's administrative enforcement proceedings, all defenses are required to be raised in the answer. 40 C.F.R. § 22.15(b). Both the judicial treatment of affirmative defenses and the Board's enforcement of 40 C.F.R. section 22.15(b) acknowledge the rule of waiver for failure to include defenses in a responsive pleading such as an answer. However, in both judicial and administrative proceedings, waiver is not always strictly enforced.[7] In *Lazarus*, the Region asserted that it was prejudiced by the respondent's delay in asserting the PRA public protection defense only a few weeks prior to the scheduled hearing, and we upheld the Presiding Officer's decision to allow the defense, in that there was no delay in the proceedings or apparent prejudice to the Region.[8] *See Lazarus*, at 335.

In the present case, the PRA defense was also raised in close proximity to the hearing, but significantly later in the overall context of the proceedings. The Presiding Officer had already issued an order as to Zaclon's liability and had rejected Zaclon's other defenses. Presumably, had the PRA defense been raised at the time of the motions for accelerated decision, the Presiding Officer could have

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[7] Subsequent to our decision in *Lazarus*, the United States Court of Appeals for the District of Columbia held that Fed. R. Civ. P. 8(c) mandates strict enforcement of the waiver rule for failure to raise an affirmative defense in a pleading. *Harris v. Secretary, United States Dep't of Veterans' Affairs*, 126 F.3d 339 (D.C. Cir. 1997). *Harris* recognizes, however, that its strict enforcement of Fed. R. Civ. P. 8(c) is at odds with the practice of some other circuits, which permit affirmative defenses to be raised outside of a responsive pleading. The *Harris* decision notwithstanding, we are not inclined to alter the construct we set forth in *Lazarus* regarding late assertion of defenses. In *Lazarus*, we reviewed pre-*Harris* judicial precedent on waiver in considering the issue of late assertion of defenses in EPA administrative proceedings. Although we sometimes look to the Federal Rules of Civil Procedure for guidance as we did in *Lazarus*, the Federal Rules do not directly apply to EPA's administrative proceedings. The Board has authority to independently resolve procedural questions that are not addressed in our rules of practice. 40 C.F.R. § 22.01(c). Consequently, we do not adopt the bright-line procedural rule of *Harris.*

[8] Undue delay and prejudice are just two potential reasons for declining to permit late assertion of a defense. These two factors are listed with others (*e.g.*, bad faith, dilatory motive on the part of the movant, and futility of amendment) in *Foman v. Davis*, 371 U.S. 178, 182 (1962), which set forth a liberal standard for amendments to pleadings. Issues of delay and prejudice, and any other *Foman* factor that may be present, should be considered by the Presiding Officer in determining whether a late defense is waived. *See Lazarus*, at 329-335. The Region's argument for waiver in this case, however, does not allege that other *Foman* factors are at issue.

issued a PRA ruling in lieu of or in addition to his liability decision, potentially eliminating the need for further proceedings such as a penalty hearing. This type of consideration is a reason that defenses should ordinarily be asserted much earlier in the proceedings than was the case here. Despite the longer delay in this case, we nonetheless affirm the Presiding Officer's decision that Zaclon did not "continually fail" to raise the PRA throughout the proceedings. Initial Decision at 14.

We also agree with the Presiding Officer's finding that the Region was not prejudiced by the PRA defense. As in *Lazarus*, the Region here provided an immediate response to the PRA defense. The Region filed a motion in limine to exclude evidence pertaining to the PRA defense within days of receiving Zaclon's supplemental pre-hearing exchange that raised the PRA defense. At the hearing, the Presiding Officer explicitly opened the record to PRA evidence and noted that the hearing would be reopened if necessary. Tr. at 6 & 146. Both parties addressed the PRA issue in post-hearing briefing. The Region submitted an affidavit from an EPA employee in support of one of its PRA arguments as an exhibit to its post-hearing reply brief. The Region now argues on appeal that it could have presented additional evidence with regard to the PRA. However, it did not proffer such additional evidence at the post-hearing stage nor did it move to reopen the hearing to take further evidence pursuant to 40 C.F.R. section 22.28 after the initial decision was issued. The Region had opportunities to bring additional evidence to light prior to and during the hearing, during the post-hearing briefing, and after issuance of the initial decision.[9] Therefore, we are not persuaded that the Region was prejudiced in its ability to address the PRA defense.

We will not disturb the Presiding Officer's decision to permit Zaclon to raise a PRA defense. Importantly, the Region has not established that the proceedings were unduly delayed or that it was prejudiced as a consequence of the Presiding Officer's decision.

[9] The Region argues that it "did not learn what Zaclon's defense was until it received Zaclon's post-hearing Brief." Brief of Appellant, United States Environmental Protection Agency at 38 ("Region's Brief on Appeal"). While we acknowledge that Zaclon's use of a supplemental pre-hearing exchange as a vehicle to raise a defense is highly irregular, that document does contain a paraphrase of the public protection provision of the PRA. Moreover, the public protection provision is the only statutory defense in the PRA. Although we recognize that the Region may not have known all of the parameters of Zaclon's PRA defense, we think that the Region's task of responding to the defense was not so difficult as to require that we reverse the Presiding Officer's finding of lack of prejudice.

C. *Administrative Enforcement Exemption*

In addition to waiver, the Region argues that Zaclon cannot invoke the public protection provision of the PRA because the September 20, 1990 call-in letter to Zaclon is exempted from coverage under the PRA by statute.[10]

The principal exemptions from the requirements of the PRA relate to law enforcement and litigation. The exemptions are designed to preserve traditional means of obtaining information during investigations and legal actions without requiring the involvement of OMB. The exemption claimed by the Region in this case applies to agency enforcement activities:

> [T]his chapter [*i.e.,* the PRA] does not apply to the collection of information—
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> * * * * * * *
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> (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).

This particular exemption appears in the same statutory subsection with exemptions for federal criminal investigations, prosecutions, and civil actions involving the United States. *See* 44 U.S.C. §§ 3518(c)(1)(A) & (c)(1)(B)(i). The exemptions were suggested by the Department of Defense and the Central Intelligence Agency during development of the PRA legislation in 1980. S. Rep. No. 96-930, at 22 & 24 (1980). The legislative history explains that these exemptions were designed to cover a variety of traditional information gathering techniques used during the course of an enforcement action:

> [S]ection 3518(c)(1) creates certain exemptions for civil and criminal law enforcement that apply to collection of evidence pursuant to investigations, whether before or after initiation of formal charges. These exemptions

[10] The Region's exemption argument presumes that the September 20, 1990 letter was an ICR. However, in forwarding its argument on display, discussed *infra* Section II.D., the Region presumes that the underlying regulation, 40 C.F.R. § 270.1(c), is the ICR. Although we are cognizant of possible distinctions between the letter and the regulation under the PRA, it is not necessary for us to resolve those issues in this case.

> are not limited to formal discovery or analogous stages in administrative processing and include interrogatories, depositions, and subpoenas. * * * The language in this subsection [3518(c)(1)(B)] regarding "an administrative action or investigation involving an agency against specific individuals or entities" is intended to preserve a well-settled exception for subpoenas and similar forms of compulsory process used for the collection of evidence or other information in an adjudication or investigation for law enforcement purposes. [citations omitted] Section 3518(c)(1)(B) is not limited to agency proceedings of a prosecutorial nature but also include[s] any agency proceeding involving specific adversary parties.

Id. at 55-56. The rationale behind the exemption for information collection devices used in agency enforcement actions was discussed further:

> Similar to the collection of information in litigation, an agency's intended use of investigatory and adjudicative process is sufficiently safeguarded through judicial superintendence to render unnecessary the administrative clearance process of [the PRA].

Id. at 56. 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.

In practice, the administrative enforcement exemption to the PRA has been applied to ICRs that are compulsory in nature and a standard part of an agency's investigatory program. The first items that courts found to be covered by the PRA's administrative enforcement exemption were summonses issued by the Internal Revenue Service ("IRS") in conjunction with tax investigations. *United States v. Saunders*, 951 F.2d 1065, 1067 (9th Cir. 1991) (IRS "summonses were valid even absent either an OMB number or a statement that the document request is not subject to the requirements of section 3512"); *United States v. Particle Data, Inc.*, 634 F. Supp. 272, 275 (N.D. Ill. 1986). Another category of cases in which the PRA's administrative enforcement exemption has been applied involves the Department of the Interior's Mineral Management Service ("MMS"). The MMS requests documents from lessees of federal mineral rights for the purpose of auditing their royalty payments to the government. The MMS's docu-

ment requests for audit purposes were found to fall within the PRA's administrative enforcement exemption. *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 September 20, 1990 letter requesting a part B permit application from Zaclon in this case can be distinguished from the information requests at issue in the IRS and MMS cases. The IRS summonses and MMS audits were for the specific purpose of determining the recipients' compliance with certain legal obligations. In contrast, the September 20, 1990 letter to Zaclon does not suggest that Zaclon's compliance with RCRA is under investigation. Although the Region claims that it opened a "facility case file regarding Zaclon" upon issuance of the September 20, 1990 letter, and that the letter was part of an effort to "investigat[e] compliance" of facilities that had closed interim status units,[11] the regulatory context for the letter suggests that the letter was not part of an enforcement action or investigation, but rather a standard permit application call-in letter. The letter was the first step in the Agency's RCRA permitting process. RCRA regulations specifically contemplate that an owner/operator will receive six months notice before a part B permit application is due. 40 C.F.R. § 270.1(b). The September 20, 1990 letter appears to be providing the required notice. The Region had no reason to believe that the company would not comply with the information request. Zaclon's compliance became an issue only after it failed to respond to the September 20, 1990 letter within six months. In addition, until the complaint was filed, there was no indication of an adversarial relationship between Zaclon and the Region. Thus, we do not interpret the September 20, 1990 letter as a part of a compliance investigation or other enforcement activity that would fall within the administrative enforcement exemption to the PRA.

D. *Display*

Having found that the PRA defense was not waived, and that the PRA's administrative enforcement exemption is not applicable, we now consider whether the public protection provision of the PRA prohibits assessment of a penalty against Zaclon. This inquiry turns on the PRA requirement to "display" an OMB control number on ICRs.

[11] Region's Brief on Appeal at 26.

OMB's regulations implement the PRA display requirement and provide insight into the meaning of display.[12] First, OMB's regulations prohibit information collection activities by agencies such as EPA unless OMB control numbers are displayed on collections of information:

> An agency shall not engage in a collection of information without obtaining Office of Management and Budget (OMB) approval of the collection of information and displaying a currently valid OMB control number * * *.

53 Fed. Reg. 16,618, 16,624 (May 10, 1988) (previously codified at 5 C.F.R. § 1320.4(a)). The regulations also restate the statutory public protection provision:

> Notwithstanding any other provision of law, no person shall be subject to any penalty for failure to comply with any collection of information:
>
> > (1) That does not display a currently valid OMB control number; * * *[.]

Id. (previously codified at 5 C.F.R. § 1320.5(a)). Finally, the regulations, unlike the statute, provide a definition of "display":

> "Display" means:
>
> * * * * * * *
>
> > (2) In the case of collections of information published in regulations, * * * to publish the OMB control number in the Federal Register (as part of the regulatory text or as a technical amendment) and ensure that it will be included in the Code of Federal Regulations * * *[.]

Id. at 16,625 (previously codified at 5 C.F.R. § 1320.7(e)).

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[12] OMB regulations as promulgated in 1988 apply to this case. 53 Fed. Reg. 16,618 (May 10, 1988). However, the 1988 regulatory provisions that pertain to this case are largely the same as OMB's original PRA regulations, promulgated in 1983. *See* 48 Fed. Reg. 13,666 (Mar. 31, 1983). The current PRA regulations, codified at 5 C.F.R. part 1320, were promulgated to implement the 1995 PRA and differ from the 1983 and 1988 versions in both substance and organization. *See* 60 Fed. Reg. 44,978 (Aug. 29, 1995).

The Region asserts that an OMB control number was properly displayed for 40 C.F.R. section 270.1(c), the RCRA regulation that requires owners and operators of hazardous waste units to have post-closure permits or demonstrate closure by removal. The Region points out that the Federal Register preamble to the final rule promulgating amendments to section 270.1(c) contained an OMB control number. *See* 52 Fed. Reg. 45,788, 45,797 (Dec. 1, 1987). The Region argues that publication of an OMB control number in the preamble to the final rule was sufficient to constitute display. As support for this argument, the Region references a 1993 opinion from the General Counsel of OMB in which the General Counsel approved certain means of display sometimes used by the EPA, including publication of OMB control numbers in Federal Register preambles.[13] The Region urges us to find that preamble publication in this case constituted display.

In response, Zaclon asks us to uphold the Presiding Officer's analysis regarding display of an OMB control number for 40 C.F.R. section 270.1(c). The Presiding Officer rejected the Region's preamble argument and held that OMB's regulatory definition of display mandates that the OMB control number appear "as part of the regulatory text or as a technical amendment" in the Federal Register and that the control number be subsequently published in the C.F.R. Initial Decision at 18. Thus, the Presiding Officer found that the public protection provision of the PRA bars assessment of any penalty in this case due to a failure to display an OMB control number in the regulatory text of 40 C.F.R. section 270.1(c). *Id*. at 19-20.

The Board undertakes *de novo* review of matters on appeal and finds it unnecessary to address the particulars of the parties' arguments on display in this case. Instead, we find that there was only one mandatory collection of information at issue in this case and an OMB control number was displayed for that collection of information by publishing the control number in the regulatory text in both the Federal Register and the C.F.R. Because there was proper display of an OMB control number for the mandatory collection of information, the public protection provision of the PRA does not provide a defense in this case.

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[13] Letter from Robert G. Damus, Acting General Counsel, Office of Management and Budget, to Gerald H. Yamada, Acting General Counsel, Environmental Protection Agency (May 28, 1993). A full discussion of the content of the 1993 OMB opinion letter is provided in *Lazarus*, at 349-359.

Zaclon was charged with violating the following regulation:

> Owners or operators of * * * waste pile units that received wastes after July 26, 1982, or that certified closure [pursuant to interim status standards] after January 26, 1983, *must have post-closure permits, unless* they demonstrate closure by removal as provided under § 270.1(c)(5) and (6).

40 C.F.R. § 270.1(c) (emphasis added). This requirement is comprised of a mandatory directive, *i.e.*, to have a post-closure permit, and optional procedures through which a facility may escape the post-closure permit obligation, *i.e.*, demonstration of closure by removal (through submission and approval of an "equivalency demonstration").

Section 270.1(c) makes the obligation to have a post-closure permit mandatory, "unless" closure by removal is successfully demonstrated. The preamble to this rule explains the relationship between the permit obligation, which is effectuated through a RCRA part B permit application, and the procedures available for demonstrating closure by removal, *i.e.*, "equivalency demonstrations":

> EPA has decided to use the Part B permit application process as the primary mechanism for collecting the information to allow a determination to be made as to whether a regulated unit which closed by removal or decontamination did so in compliance with the corresponding requirements of Part 264.
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> * * * * * * *
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> However, the Agency has decided that an owner-operator should be allowed to demonstrate that a unit has been closed in accordance with the Part 264 closure by removal or decontamination standards, without having to submit a full Part B application for a post-closure permit. Therefore, the Agency is establishing a mechanism in today's rulemaking to allow such "equivalency demonstrations" to be made outside the Part B permit process.
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> * * * * * * *

> These requests [equivalency demonstrations] may be submitted at any time * * * including when EPA calls in the Part B post-closure permit application.
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> * * * * * * *
>
> It should be understood that the process of demonstrating equivalency of closure will not affect the due date of a Part B application once it has been requested.

52 Fed. Reg. at 45,795. Thus, in its regulations EPA retained the mandatory nature of the part B permit application, while also providing an optional process, that if completed in a timely manner and to EPA's satisfaction, would essentially provide an exemption from the post-closure permitting requirements.

Although only the permitting obligation is mandatory, both the permit process and the optional equivalency demonstration process involve collections of information that are subject to the PRA.[14] The obligation to have a permit is effectuated through submission of a RCRA permit application. *See* 40 C.F.R. § 270.1(b) (describing part B of the RCRA permit application with a cross-reference to 40 C.F.R. § 270.14 and setting deadlines for the submission of this application).[15] The information to be included in the part B permit application is primarily delineated at 40 C.F.R. section 270.14, entitled "Contents of part B: General requirements." Section 270.14 lists the "general information requirements" necessary for the EPA to make a permit decision. A part B application must include descriptions, analyses, and various procedures pertaining to a facility. 40 C.F.R. § 270.14. The information requirements set forth in section 270.14 are necessary to fulfill RCRA's permitting obligation. As for the optional equivalency demonstration, applicable procedures are set forth in 40 C.F.R. sections 270.1(c)(5) & (6). Those procedures provide for submission of either a RCRA part B application for a post-closure permit or a petition to the Regional Administrator seeking a determination that a post-closure permit is not required. 40 C.F.R. §§ 270.1(c)(5)(i) & (ii). The equivalency demonstration must include data and/or information from which the Regional Administrator can determine if stan-

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[14] The regulatory definition of "collection of information" specifically includes paperwork requirements that are "mandatory, voluntary, or required to obtain a benefit." 53 Fed. Reg. at 16,625 (previously codified at 5 C.F.R. § 1320.7(c)).

[15] *See also* 40 C.F.R. § 270.10 ("[a]ny person who is required to have a permit * * * shall complete, sign, and submit an application * * *").

dards for closure by removal are met. Because both the RCRA permit application and the optional equivalency demonstration are collections of information, they are subject to PRA requirements, including display of an OMB control number.

Even though the PRA affirmatively requires display of an OMB control number for collections of information, 44 U.S.C. § 3507(f), the PRA's public protection provision only applies where a person is subject to penalties for failure to comply with a particular collection of information. 44 U.S.C. § 3512. Optional procedures cannot serve as a basis for a penalty action. Only mandatory requirements can give rise to a penalty action and hence, a potential application of the PRA defense. Here, the mandatory portion of the regulation violated, 40 C.F.R. section 270.1(c), is the requirement to have a permit. The collection of information associated with that requirement is set forth outside of section 270.1(c), principally at 40 C.F.R. section 270.14. An OMB control number was unequivocally displayed in 40 C.F.R. section 270.14 during the time period in question in this case.[16] Thus, the PRA defense does not shield Zaclon from assessment of an appropriate penalty for its late compliance with 40 C.F.R. section 270.1(c).[17]

We find that the public protection provision of the PRA does not bar assessment of a penalty against Zaclon in this case, and we reverse the holding of the Presiding Officer in this regard. This case is remanded to the Presiding Officer for determination of an appropriate penalty for Zaclon's failure to timely submit a RCRA part B permit application for a post-closure permit.

III. *CONCLUSION*

The Presiding Officer's decision to dismiss the Region's complaint against Zaclon based upon the public protection provision of the PRA is reversed and remanded. With regard to the specific issues raised by

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[16] OMB control numbers were published in the Federal Register as part of the regulatory text of 40 C.F.R. section 270.14 well before this case was initiated. *See* 51 Fed. Reg. 44,418, 44,420 (Dec. 9, 1986); 52 Fed. Reg. 45,788, 45,799 (Dec. 1, 1987). In addition, beginning with the 1987 edition of the C.F.R., and continuing through the 1992 edition, one or more OMB control numbers were displayed in the text of section 270.14. Beginning with the 1993 C.F.R., EPA has displayed OMB control numbers assigned to EPA regulations in table form at 40 C.F.R. part 9. *See* 58 Fed. Reg. 34,369 (June 25, 1993).

[17] Pursuant to the Region's call-in letter, Zaclon was obligated to apply for a permit by April 1, 1991. Having failed to do so, Zaclon was in violation of 270.1(c) until September 1992, at which time the Region approved Zaclon's equivalency demonstration and Zaclon was released from the obligation to have a permit.

the Region on appeal, the Board finds: 1) Zaclon's late assertion of the PRA defense did not result in a waiver of that defense; 2) the PRA's administrative enforcement exemption is not applicable to the Region's September 20, 1990 letter requesting that Zaclon submit a part B permit application or an equivalency demonstration; and 3) despite questions regarding the adequacy of display of an OMB control number for 40 C.F.R. section 270.1(c), the PRA defense is not applicable because the mandatory portion of section 270.1(c), *i.e.*, the obligation to have a permit, is implemented through the RCRA part B permit application, for which an OMB control number was unambiguously displayed at 40 C.F.R. section 270.14.

On remand, the Presiding Officer shall determine and assess an appropriate penalty for Zaclon's failure to timely submit a RCRA part B permit application for a post-closure permit.

So ordered.