IN RE LAZARUS, INC.

TSCA Appeal No. 95-2

FINAL DECISION AND ORDER

Decided September 30, 1997

Syllabus

United States Environmental Protection Agency Region V ("Region") and Lazarus, Inc. ("Lazarus") appeal from an initial decision in which an EPA administrative law judge ("Presiding Officer") assessed a penalty against Lazarus for a variety of violations of EPA's regulations on polychlorinated biphenyls ("PCBs"). The Presiding Officer also dismissed certain counts of the Region's complaint based on the "public protection" provision of the Paperwork Reduction Act ("PRA"), 44 U.S.C. § 3512, and the statute of limitations at 28 U.S.C. § 2462.

The Region's administrative enforcement action followed a PCB inspection of Lazarus' Columbus, Ohio department store and annex building in February 1992. The inspection revealed a number of deviations from EPA's PCB regulations relating to two PCB transformers located in the annex building. The Region filed a twelve-count complaint against Lazarus and proposed a penalty of $117,000. Lazarus' answer to the complaint raised several defenses, including the statute of limitations. Approximately three weeks prior to the scheduled hearing date, Lazarus raised a PRA defense in a motion for accelerated decision. After the hearing and completion of post-hearing briefing, the Presiding Officer issued an initial decision in which he relied on the PRA to dismiss two counts of the complaint. The Presiding Officer also held that the statute of limitations provided a defense to portions of certain counts but not to other counts. The Presiding Officer further rejected Lazarus' remaining arguments in defense and assessed a penalty of $34,800.

Both parties appeal to the Environmental Appeals Board ("Board"). The Region appeals the Presiding Officer's dismissal of counts based on the PRA. Lazarus appeals the Presiding Officer's rulings on a variety of matters, including: the applicability of the PRA defense, the statute of limitations, whether the Region's complaint provided fair notice of an intent to allege violations of recordkeeping requirements associated with transformer inspections, and application of the EPA's presumption against penalties for PCB spills in cases where an adequate cleanup has been performed.

HELD:

With regard to the timeliness of Lazarus' assertion of a PRA defense:

- The Board upholds the Presiding Officer's decision to entertain Lazarus' PRA defense. Lazarus' assertion of a PRA defense was late, but the delay alone was not sufficient to bar the defense in this case. The Presiding Officer may bar untimely defenses where, for example, the delay in raising the defense will interfere with the Presiding Officer's duty to conduct an efficient adjudication, or where there is evidence of prejudice to the oppos-

ing party. In this case, however, there was no delay in the proceedings or apparent prejudice to the Region. (*See* Section II.A.1.)

With regard to the PRA defense and the alleged violations of the regulatory requirement at 40 C.F.R. § 761.180(a) to prepare and maintain PCB annual documents for calendar years 1978-1988:

- The PRA defense is not applicable to violations of the PCB annual document requirement for calendar years 1978-1980 because the PRA's public protection provision only applies after December 31, 1981. (*See* Section II.A.2.a.)

- After December 31, 1981, the PRA defense is applicable to the regulatory requirement to prepare a PCB annual document because the requirement is an "information collection request," notwithstanding that the requirement was promulgated through notice and comment rulemaking. The 1986 PRA Amendments, as noted in the legislative history and subsequent rulemaking by the Office of Management and Budget ("OMB"), clarified Congress' original intent regarding the PRA's treatment of notice and comment rules. The PRA defense is thus applicable to PCB annual documents required to be prepared both before and after the 1986 PRA Amendments. (*See* Section II.A.2.b.)

- The PRA defense prohibits assessment of penalties for failure to prepare PCB annual documents for calendar years 1981-1984 because an OMB control number indicating OMB review and approval of the requirement was not displayed in any manner during the time period in which PCB annual documents for those years were due. (*See* Section II.A.2.c.(1))

- The PRA defense prohibits assessment of penalties for failure to prepare PCB annual documents for calendar years 1985-1988. Upon analysis of the PRA, its implementing regulations, and an opinion of the General Counsel of OMB, the Board finds that the means used to display the OMB control number for this requirement was inadequate during the time period in which the PCB annual documents for 1985-1988 were due. Although the General Counsel's opinion is entitled to some deference, the resolution of the "display" issue does not depend on the analysis of the deference due the opinion. The means of display actually used for the PCB annual document regulation do not accord with the descriptions of adequate methods of display referenced in the General Counsel's opinion. (*See* Section II.A.2.c.(2))

With regard to the PRA defense and the alleged violations of the regulatory requirement at 40 C.F.R. § 761.40(j) to mark the access door to a room containing PCB transformers with a M_L warning label:

- The Board finds that the requirement to mark the means of access to a PCB transformer is a third party disclosure requirement. For the time period at issue in this case, controlling precedent from the Supreme Court of the United States established that third party disclosure requirements were not covered by the PRA. Alternatively, the requirement to mark the means of access to a PCB transformer is excluded from PRA requirements by regulation because it merely calls for the dissemination of information supplied by the Federal government (i.e., the M_L warning). For both reasons, the PRA public protection provision does not provide a defense to a failure to comply with the marking requirement. (*See* Sections II.A.3.a. & b.)

With regard to the statute of limitations defense:

- The requirements to register PCB transformers with the local fire department (40 C.F.R. § 761.30(a)(1)(vi)) and to mark the access door (40 C.F.R. § 761.40(j)) are conditions of the use authorization for PCB transformers. Conditions of a use authorization are continuing obligations that effectively carry out the statutory prohibition on the use of PCBs which applies after January 1, 1978. An action for penalties is not barred by the statute of limi-

tations where violations of these requirements continued into the five-year period preceding the filing of the complaint. (*See* Sections II.B.1. & 2.)

- The requirement to prepare and maintain PCB annual documents (40 C.F.R. § 761.180(a)) is not continuing in nature. The statute of limitations provides a defense to an action for penalties for violations of the requirement to prepare and maintain PCB annual documents for calendar years 1978-1980. (*See* Section II.B.3.)

Other holdings:

- The Board finds that Lazarus received fair notice of the Region's intent to seek penalties for violations of the recordkeeping requirements associated with transformer inspections (40 C.F.R. § 761.30(a)(1)(xii)). The Region's complaint explicitly alleged violations of the requirement to maintain records of inspections. (*See* Section II.C.)

- The Presiding Officer did not commit error in failing to grant a 100% penalty reduction for Lazarus' spill violation. The record shows that Lazarus did not fully comply with the spill cleanup policy at 40 C.F.R. §§ 761.120-761.135. Therefore, Lazarus is not entitled to a 100% penalty reduction pursuant to 40 C.F.R. § 761.135(a). (*See* Section II.D.)

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

Opinion of the Board by Judge Stein:

Both the United States Environmental Protection Agency Region V ("Region")[1] and Lazarus, Inc. ("Lazarus") appeal various issues arising out of an administrative enforcement action against Lazarus for alleged violations of regulations on polychlorinated biphenyls ("PCBs") pertaining to two PCB transformers at Lazarus' department store annex in Columbus, Ohio. The appeals raise the following principal issues:

1a) Does the Paperwork Reduction Act ("PRA"), 44 U.S.C. §§ 3501-3520, prohibit assessment of a penalty for alleged violations of the regulatory requirement to prepare and maintain PCB annual documents for calendar years 1978-1988?[2] (Region's appeal)

1b) Does the PRA prohibit assessment of a penalty for alleged violations of the regulatory requirement to mark the access door to a room containing PCB transformers? (Lazarus' appeal)

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[1] EPA's Office of Enforcement and Compliance Assurance joined the Region's briefs in this case.

[2] The Paperwork Reduction Act issues presented in these appeals are matters of first impression for the Board. A number of subissues pertaining to the PRA are identified and discussed *infra* Section II.A.

2) Does the statute of limitations at 28 U.S.C. § 2462 bar the Region from maintaining an action for alleged violations of: (a) the regulatory requirement to register PCB transformers with local fire response personnel; (b) the regulatory requirement to mark the access door to a room containing PCB transformers; and (c) the regulatory requirement to prepare PCB annual documents for calendar years 1978-1986? (Lazarus' appeal)

3) Did the Region's complaint provide fair notice of the Region's intent to allege violations of the regulatory requirement to maintain records of quarterly transformer inspections? (Lazarus' appeal)

4) Did the Presiding Officer commit error in his penalty assessment by failing to award Lazarus a 100% penalty reduction based on the regulatory presumption against penalties for PCB spills that have been adequately cleaned up? (Lazarus' appeal)

We make the following findings as to the principal issues on appeal:

1a) Penalties for violations of the regulatory requirement to prepare and maintain PCB annual documents are barred in part by the PRA.

1b) The PRA does not bar assessment of a penalty for violation of the regulatory requirement to mark the access door to a room containing PCB transformers.

2a&b) The requirements to mark the access door and to register PCB transformers with the local fire department are continuing obligations, and thus, an action for penalties based on continuing violations of these requirements is not barred by the statute of limitations.

2c) The requirement to prepare and maintain PCB annual documents is barred in part by the statute of limitations at 28 U.S.C. § 2462.

3) The Region's complaint fairly alleged violations of the regulatory requirement to maintain records of quarterly transformer inspections.

4) The Presiding Officer did not commit error in failing to grant a 100% penalty reduction for Lazarus' spill violation.

In accordance with these holdings and as further explained in this opinion, we uphold the assessment of a penalty against Lazarus in the amount of $34,800.

I. *BACKGROUND*

On February 13, 1992, employees of the Ohio Environmental Protection Agency ("OEPA") conducted a PCB inspection of Lazarus' department store and annex building in Columbus, Ohio pursuant to a cooperative enforcement program between OEPA and the United States Environmental Protection Agency ("EPA"). The inspection addressed Lazarus' past and present use of PCB transformers, including two in-service PCB transformers located in the annex building. Each transformer contained approximately 140 gallons of PCB fluid at a concentration of greater than 500 parts per million ("ppm") PCB.[3] The inspection revealed a number of deviations from EPA's regulations on the use, marking, recordkeeping, and disposal of PCBs as related to these transformers. *See* 40 C.F.R. Part 761.

The current regulatory scheme for transformers containing PCB fluid is predicated on section 6(e) of the Toxic Substances Control Act ("TSCA"), which mandates the control and phase-out of manufacturing, processing, distribution in commerce, and use of PCBs. 15 U.S.C. § 2605(e). Congress was motivated to enact TSCA section 6(e) due to the dangers associated with PCBs:

> The problems associated with widespread use and dispersal of PCB's [sic] (Polychlorinated Biphenyls) are a prime example of the type of chemical hazard to which the Toxic Substances Control Act should immediately address itself. PCB's * * * are extremely stable (long-lived) which leads to the risk of bioaccumulation and concentration in fish and other aquatic animals as well as in the tissues of man.

H.R. Rep. No. 94-1341, at 133 (1976) (supplemental views of Rep. Dingell). TSCA section 6(e) directs the EPA to take a variety of regulatory actions on PCBs.[4]

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[3] The regulations at issue in this case apply to "PCB Transformers," which are defined as "any transformer that contains 500 ppm PCB or greater." 40 C.F.R. § 761.3 *PCB Transformer*.

[4] TSCA directs EPA to issue rules on: disposal methods for PCBs, TSCA § 6(e)(1)(A); requirements for marking PCBs with warnings and instructions, § 6(e)(1)(B); the manufacture, processing, distribution in commerce, and use of PCBs other than in a totally enclosed manner, § 6(e)(2)(B); the definition of "totally enclosed manner," § 6(e)(2)(C); and individual requests for exemptions from the PCB ban, § 6(e)(3)(B).

Regulation of PCBs in transformers gradually expanded as the EPA learned more about the dangers and potential for PCB exposure from transformers. EPA's original regulatory effort focused on requirements for marking and disposal of PCBs, including those in transformers.[5] PCBs in transformers accounted for nearly 40% of all PCBs in service at the time of the first PCB regulations. *See* 42 Fed. Reg. 26,561 (May 24, 1977). The original rules were designed to govern the disposition of PCBs as a means of controlling exposure to PCBs during accidental and intentional disposal. The next set of regulations pertaining to PCB transformers addressed the risk of leaks from in-use transformers.[6] EPA was concerned about the heightened potential for exposure to PCBs from transformers because of the relatively high concentrations and large quantities of PCBs used in transformers. 47 Fed. Reg. 37,342, 37,345 (Aug. 25, 1982). Later, EPA learned of hazards especially associated with PCB transformer fires:

> EPA has learned that fires involving transformers also can be responsible for the release of PCBs, and that PCBs released from transformers in fire situations can be volatilized and converted into materials which are orders of magnitude more toxic than PCBs.

50 Fed. Reg. 29,170 (July 17, 1985). Additional regulations were promulgated to control PCB exposures in case of a fire. *Id*. at 29,199. The inspection at Lazarus' facility found elements from each of these regulatory initiatives that had not been implemented.

Specifically, the inspectors found that Lazarus: 1) had failed to register the PCB transformers with the local fire department; 2) was storing combustible materials in close proximity to the transformers; 3) was deficient with regard to the frequency and documentation of PCB transformer inspections; 4) had not marked the access door to the room containing the PCB transformers with the specified cautionary label; and 5) had failed to prepare annual documents summarizing the disposition of PCB items at the facility. Most of these deficiencies

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[5] *See* 42 Fed. Reg. 26,561 (May 24, 1977) (proposed regulations on marking and disposal); 43 Fed. Reg. 7150 (Feb. 17, 1978) (final regulations on marking and disposal).

[6] *See* 46 Fed. Reg. 16,090 (Mar. 10, 1981). These regulations established an "interim measures" program requiring owners of PCB transformers to visually inspect transformers on a quarterly basis, maintain records of inspections, and promptly correct leaks when observed. The "interim measures" program was established in response to a court decision overturning EPA's decision to exempt transformers from most regulation under TSCA section 6(e). *Environmental Defense Fund, Inc. v. EPA*, 636 F.2d 1267 (D.C. Cir. 1980). The "interim measures" program was later promulgated as a final rule. 47 Fed. Reg. 37,342 (Aug. 25, 1982).

had been consistently present since the effective dates of the regulations, which date back as far as 1978 for certain requirements. In addition to the five problems listed above, the inspectors observed that one of the transformers was leaking (or had leaked) PCB oil onto the floor, constituting an improper "disposal" of PCBs.[7]

On June 16, 1993, approximately sixteen months after the inspection, the Region brought a twelve-count administrative enforcement action against Lazarus, alleging violations of the PCB regulations corresponding to the problems discovered during the course of the inspection. The Region proposed a total penalty of $117,000 pursuant to TSCA section 16(a).[8] Lazarus answered the complaint in July 1993 by denying liability and requesting a hearing.[9] In August 1993, Administrative Law Judge Frank Vanderheyden issued a scheduling order calling for submission of pre-hearing exchanges followed by a period for discovery. The order also placed the following restriction on motions:

> Any motions, * * * must be served within sufficient time which, in the opinion of the undersigned, will not cause delay in, or interfere with, the scheduled hearing date. Failure to observe this may result in such motions being denied.

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[7] The PCB regulations define "disposal" broadly:

> Disposal includes spills, leaks, and other uncontrolled discharges of PCBs * * *.

40 C.F.R. § 761.3 *Disposal*.

[8] TSCA section 16(a)(1) provides that:

> Any person who violates a provision of [TSCA section 15] shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation.

TSCA § 16(a)(1), 15 U.S.C. § 2615(a)(1). TSCA section 15 establishes that it is unlawful to fail to comply with TSCA's statutory or regulatory requirements, including those pertaining to PCBs.

[9] TSCA provides for hearings in civil penalty actions:

> A civil penalty for a violation of [TSCA section 15] shall be assessed by the Administrator by an order made on the record after opportunity * * * for a hearing * * *.

TSCA § 16(a)(2), 15 U.S.C. § 2615(a)(2).

In the Matter of Lazarus, Inc., Docket No. TSCA-V-C-032-93 (Aug. 24, 1993) (Notice and Order). Pre-hearing exchanges were submitted in December 1993 and April 1994. Judge Vanderheyden issued an order in March 1994 scheduling an evidentiary hearing for June 8 and 9, 1994. During the three weeks prior to the hearing, the parties filed a flurry of motions. The Region filed two motions to amend the complaint; Lazarus filed two motions to dismiss and two motions for accelerated decision. Each of Lazarus' motions asserted a distinct legal theory. One motion asserted PRA defenses; another addressed the statute of limitations. At the hearing, Administrative Law Judge Gerald Harwood ("Presiding Officer")[10] indicated that he would take Lazarus' motions under advisement and rule on them in the context of the Initial Decision. Hearing Transcript ("Tr.") at 10, 227-28. Post-hearing briefing was completed in April 1995. The Initial Decision was issued on May 25, 1995.

The Presiding Officer dismissed two counts of the complaint based on the "public protection" provision of the PRA, 44 U.S.C. § 3512.[11] The Presiding Officer also barred portions of other counts due to the statute of limitations. Although the Presiding Officer rejected Lazarus' defenses as to the remaining counts, he significantly reduced the penalty amounts proposed by the Region. A total penalty of $34,800 was assessed for violations of six separate PCB regulations, each of which involved several years of non-compliance by Lazarus.[12]

[10] Judge Harwood replaced Judge Vanderheyden in this case in May 1994. For clarity, we use the term "Presiding Officer" to refer to Judge Harwood.

[11] *See* discussion of 44 U.S.C. § 3512 *infra* nn.20-22 and accompanying text.

[12] The penalties assessed by the Presiding Officer and the corresponding regulatory violations are as follows:

- $6,000 for failure to register PCB Transformers with local fire response personnel in violation of 40 C.F.R. § 761.30(a)(1)(vi). (Count I)
- $6,000 for storage of combustible materials within five meters of PCB Transformers in violation of 40 C.F.R. § 761.30(a)(1)(viii). (Count II)
- $6,000 for failure to conduct quarterly inspections of PCB Transformers and maintain records of such inspections in violation of 40 C.F.R. §§ 761.30(a)(1)(ix) & (xii). (Counts III, IV, & VI - to the extent not barred by the statute of limitations)
- $13,000 for failure to place the required cautionary mark on the access door to the room containing the PCB Transformers in violation of 40 C.F.R. § 761.40(j). (Count VII)
- $1,300 for failure to prepare and maintain PCB annual documents for calendar years 1989 and 1990 in violation of 40 C.F.R. § 761.180(a). (Counts VIII & IX)
- $2,500 for improper disposal of PCBs (*i.e.*, PCB spill) in violation of 40 C.F.R. § 761.60. (Count XII)

Both Lazarus and the Region appeal the Initial Decision. The Region appeals the dismissal of the two counts (Counts X and XI) on PRA grounds. Lazarus appeals the Presiding Officer's rejection of a PRA defense for Count VII. Lazarus also appeals the Presiding Officer's rejection of a statute of limitations defense as to Counts I and VII.[13] In addition, Lazarus appeals the Presiding Officer's rejection of Lazarus' claim that Counts III, IV and VI provided insufficient notice of the Region's intention to allege violations of the recordkeeping requirements associated with quarterly transformer inspections. Finally, Lazarus appeals the Presiding Officer's penalty reduction of only 50% for the disposal violation in Count XII. Lazarus asserts that it is entitled to a 100% penalty reduction based on EPA's presumption against penalties for PCB spills when an adequate cleanup has been performed. Beginning with the PRA, we address each of the issues on appeal in turn.

II. *DISCUSSION*

A. *Paperwork Reduction Act Issues*

This section examines the relationship between the PRA and certain PCB regulations. Because this case involves the Board's first review of PRA issues, we begin with a general background on the PRA and its ramifications.

The Paperwork Reduction Act of 1980 ("1980 PRA"),[14] was enacted in response to the mounting burden of federal paperwork requirements imposed upon the public.[15] The first stated purpose of the 1980 PRA is:

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[13] Lazarus also raises the statute of limitations as an alternative defense to Count XI in response to the Region's appeal.

[14] Paperwork Reduction Act of 1980 ("1980 PRA"), Pub. L. No. 96-511, 94 Stat. 2812 (originally codified at 44 U.S.C. §§ 3501-3520). The 1980 PRA was subsequently amended via the Paperwork Reduction Reauthorization Amendments of 1986 ("1986 PRA Amendments"), Pub. L. No. 99-500, § 101(m), 100 Stat. 1783-335 & Pub. L. No. 99-591, § 101(m), 100 Stat. 3341-335**.** The relevant portions of the 1986 PRA Amendments are discussed *infra* Section II.A.2.b.

The amended 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). Although informative, the 1995 Act is inapplicable to this action as it post-dates the alleged violations (spanning 1978-1992), the initiation of this action (in 1993), and the filing of these appeals (in July 1995). The 1995 Act does not otherwise govern the issues on appeal. The statutory references used throughout this opinion distinguish between the three versions of the PRA as appropriate.

[15] S. Rep. No. 96-930, at 3 (1980).

> [T]o minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons[.]

1980 PRA § 3501(1).[16] In order to effectuate a reduction of federal paperwork, the 1980 PRA empowered the Office of Management and Budget ("OMB") to review proposed federal agency paperwork requirements and approve (or disapprove) such requirements.[17]

A wide variety of paperwork was subject to the 1980 PRA. The statutory definitions of "collection of information" and "information collection request" illustrate the scope of the Act:

> [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 * * *[.]

1980 PRA § 3502(4).

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

1980 PRA § 3502(11). "Recordkeeping requirement" is also defined by statute:

> [T]he term "recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified records.

1980 PRA § 3502(16).

The 1980 PRA generally prohibits federal agencies, including the EPA, from conducting or sponsoring a collection of information through imposition of information collection requests ("ICRs") on the public unless the agency has previously submitted the proposed ICR to OMB for review.[18]

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[16] The section numbers in the public law version of the 1980 PRA are the same as the section numbers in the original codification of the Act in Title 44 of the United States Code.

[17] 1980 PRA §§ 3504(c)(1) & (h); 1980 PRA § 3507(b); S. Rep. No. 96-930, at 41 (1980).

[18] 1980 PRA § 3507(a).

The 1980 PRA provides that each ICR approved by OMB is to be assigned an "OMB control number." The OMB control number is intended to serve as a tool through which the public can verify that an ICR has indeed been reviewed by OMB and meets PRA statutory criteria regarding elimination of duplicative collections, reduction of burden, and usefulness.[19]

In addition to the prohibition on agency collections of information without prior submission to OMB, Congress enacted a public protection provision to address so-called "bootleg"[20] requests that have not been through the statutory review process:

> 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] * * *.

1980 PRA § 3512. Although the legislative history suggests that it is a lack of OMB clearance that renders an ICR a "bootleg" request, Congress conditioned the public protection provision on the *display* of an OMB control number.[21] Thus, PRA section 3512 offers a potential defense for persons subject to enforcement actions involving federal regulatory paperwork requirements.[22]

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[19] *See* 1980 PRA 3507(a)(1); S. Rep. No. 96-930, at 9 (1980) (the OMB control number is an indication "that the information is needed, is not duplicative of information already collected, and is collected efficiently.")

[20] "Bootleg" requests are those that "do not conform to [the PRA's] clearance requirements." S. Rep. No. 96-930, at 14 (1980). "The purpose of this section [public protection] is to protect the public from the burden of collections of information which have not been subjected to the clearance process * * *." *Id.* at 52.

[21] An early PRA bill did not include the control number test in the public protection provision but made the protection directly contingent on the clearance process. H.R. Rep. No. 96-835, at 48 (1980). The bill that ultimately became law made the public protection provision contingent upon display of a control number. The control number test was apparently adopted for the ease of the public. "[ICRs] which do not display a current control number * * * are to be considered 'bootleg' requests and may be ignored by the public." S. Rep. No. 96-930, at 52 (1980).

[22] Courts have uniformly held that PRA section 3512 only provides a defense to violations of regulatory paperwork requirements and does not apply to paperwork requirements directly imposed by statute. *See United States v. Neff*, 954 F.2d 698, 700 (11th Cir. 1992) (PRA section 3512

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A PRA section 3512 defense was the subject of one of Lazarus' motions for accelerated decision and was the basis for the Presiding Officer's dismissal of Counts X and XI of the complaint. The Presiding Officer declined to apply the section 3512 defense to Count VII. Both parties appeal the Presiding Officer's holdings regarding the applicability of section 3512. We review the Presiding Officer's determinations as to these three counts de novo. As a preliminary matter, however, we address the timeliness of Lazarus' assertion of the PRA defense.

1. *Timeliness of Lazarus' Assertion of the Paperwork Reduction Act's Public Protection Defense*

The Region urges that Lazarus should not be permitted to pursue the PRA defense because the company failed to raise this defense in a timely manner. Lazarus first raised the PRA defense in a motion for accelerated decision filed on May 20, 1994, approximately three weeks prior to the scheduled hearing and after pre-hearing exchanges had been completed and the time for discovery had passed. The Region addressed both the timeliness of Lazarus' motion and the merits of the PRA defense in its May 31, 1994 response to Lazarus' motion. The parties also had an opportunity to address PRA issues during post-hearing briefing, although the Region declined to do so.[23] The Region now claims that it was prejudiced by the timing of Lazarus' assertion of the PRA defense.[24]

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is not a defense to the statutory requirement to file a tax return); *United States v. Hicks*, 947 F.2d 1356, 1359 (9th Cir. 1991) (same); *Gossner Foods, Inc. v. EPA*, 918 F. Supp. 359, 365-66 (D. Utah 1995) (PRA section 3512 defense is not available for failure to comply with statutory obligation to file toxic chemical release inventory form). These decisions are not applicable to the present case because the paperwork requirements at issue here are imposed by regulation rather than by statute.

[23] *See* Tr. at 227-228 (Presiding Officer invited parties to address legal issues presented in Lazarus' motions in post-hearing briefs as necessary); Complainant's Response to Respondent's Proposed Findings of Fact, Conclusions of Law, and Proposed Order (Region's post-hearing brief) at 25-26 & 28 (asserting that the PRA issues had been fully briefed at the time of Lazarus' motion for accelerated decision and did not need to be reargued in the context of the post-hearing briefs).

[24] Complainant's Brief Accompanying Notice of Appeal at 14. Notably, the Region did not claim prejudice in its May 31, 1994 response to Lazarus's motion raising the PRA defense. Rather, the Region asserted that consideration of Lazarus' PRA argument would interfere with the efficient administration of justice. Complainant's Response to Motion for Accelerated Decision for Counts VII Through XII at 4. Although the Region now claims that Lazarus should be barred from asserting a PRA defense because its May 20, 1994 motion was untimely (in that it was filed too close to the scheduled hearing date), the Region previously suggested that Lazarus could properly raise its PRA defense in a post-hearing brief. *Id.*

The Presiding Officer did not issue a separate ruling on Lazarus' motion for an accelerated decision, but he did address the merits of the PRA defense in the Initial Decision. The Presiding Officer received briefs on the issue of timeliness, and although he did not explicitly address the timeliness issue in the Initial Decision, he indicated that "all proposed findings inconsistent with this decision are rejected." Initial Decision at 3. Therefore, we infer that the Presiding Officer considered Lazarus' assertion of the defense to be timely. As discussed more fully below, our review of the rules applicable to this proceeding and authorities on the timing for assertion of defenses supports a determination that Lazarus should be permitted to raise a PRA defense in this case. Lazarus' assertion of a PRA defense was late, but the delay alone was not sufficient to bar the defense in this case. The Presiding Officer may bar untimely defenses where, for example, the delay in raising the defense will interfere with the Presiding Officer's duty to conduct an efficient adjudication, or where there is evidence of prejudice to the opposing party. Prejudice is usually manifested by a lack of opportunity to respond or need for additional pre-hearing fact-finding and preparation that cannot be readily accommodated. We are not persuaded that the Region was prejudiced in this case, and we uphold the Presiding Officer's decision to permit Lazarus to raise the PRA defense.

The Board has not had frequent occasion to rule on the timing for assertion of defenses and/or waiver of such defenses under the procedural rules at 40 C.F.R. Part 22 that govern this proceeding. Neither the Board's decisions that touch upon these issues nor the Part 22 rules provide a directly applicable rule for this case. When the Part 22 rules are not explicit on a particular procedural issue, the Board is authorized to interpret the rules and determine what practice to follow. 40 C.F.R. § 22.01(c); *In re Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 (EAB 1993). In exercising this authority, we have often looked to decisions of the federal courts on issues of procedure that may bear some similarities to our own administrative rules.[25]

A line of federal court decisions has held that the public protection provision of the PRA is an affirmative defense. *See Navel Orange*

[25] For example, although the Federal Rules of Civil Procedure are not directly applicable to administrative proceedings, the Board has consulted the Federal Rules from time to time to aid in the interpretation and application of the Part 22 rules. *See, e.g., Asbestos Specialists*, 4 E.A.D. at 827 (consulting Federal Rules of Civil Procedure to determine whether to dismiss a complaint with or without prejudice). *See also In re Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 780 (EAB 1993) (consulting Fed. R. Civ. P. 56 on summary judgment in the context of the Part 124 rules), *aff'd sub nom. Puerto Rico Aqueduct & Sewer Authority v. EPA*, 35 F.3d 600 (1st Cir. 1994).

Admin. Comm. v. Exeter Orange Co., 722 F.2d 449, 453-54 (9th Cir. 1983); *United States v. Smith*, 866 F.2d 1092, 1095 (9th Cir. 1989); *United States v. Hatch*, 919 F.2d 1394 (9th Cir. 1990); *United States v. Farley*, No. 91-55801, 1992 U.S. App. LEXIS 20598, at *4 (9th Cir. Aug. 18, 1992). These cases suggest that requirements for raising affirmative defenses may differ depending on the nature of the proceeding. *Smith* and *Hatch* were criminal proceedings in which the PRA defense was permitted to be raised at any time prior to or during the trial phase.[26] *Farley* was a civil proceeding involving the same substantive regulations as in *Smith* and *Hatch*, but the PRA defense was held to be waived when raised for the first time on appeal. *Farley*, 1992 U.S. App. LEXIS 20598, at *4. *Farley* specifically noted that the holding in *Hatch* with regard to timely assertion of a PRA defense was inapplicable in a civil case. *Id.* at *4 n.2.

Fed. R. Civ. P. 8(c) requires that nineteen listed affirmative defenses "and any other matter constituting an avoidance or affirmative defense" must be set forth in a party's responsive pleading (*e.g.*, a defendant's answer). The general rule is that failure to include a Rule 8(c) defense in the answer constitutes a waiver of that defense. *Charpentier v. Godsil*, 937 F.2d 859, 863 (3d Cir. 1991); *Simon v. United States*, 891 F.2d 1154, 1157 (5th Cir. 1990). However, the rule of waiver is not automatically applied. "[T]echnical failure to comply precisely with Rule 8(c) is not fatal." *Lucas v. United States*, 807 F.2d 414, 417 (5th Cir. 1986).

In determining when to enforce waiver, courts do not focus on the technical requirements of Rule 8(c) but look instead to the overall purpose of the Federal Rules on pleading. "The Federal Rules * * * accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Foman v. Davis*, 371 U.S. 178, 181- 82 (1962) (citing *Conley v. Gibson*, 355 U.S. 41, 48 (1957)). This philosophy is apparent in the liberal rule permitting amendments to pleadings. "[L]eave [to amend] shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). *Foman* set forth a series of factors to be considered in applying Rule 15(a). "In the absence of * * * undue delay, bad faith or dilatory motive on the part of the movant, * * * undue prejudice to the opposing party, * * * [or] futility of amendment," amendments to pleadings should be permitted. *Foman*, 371

[26] *Smith*, 866 F.2d at 1098 (PRA defense is not a mandatory pretrial matter under Fed. R. Crim. P. 12(b) and therefore was not waived when raised by the defendants after the pre-trial motion date but before the end of trial); *Hatch*, 919 F.2d at 1398 (PRA defense may be "raised at any time during the pendency of the proceedings" and therefore was not waived when raised after conviction but before sentencing).

U.S. at 182. The *Foman* factors and Rule 15(a) have been influential in cases where the timeliness of an affirmative defense was at issue.[27]

Delay by itself is generally an insufficient reason to deny a litigant the opportunity to raise a defense.[28] However, delay is frequently considered in combination with the potential for prejudice to the opposing party. Indications of prejudice include: unfair surprise, *i.e.*, a lack of adequate notice and opportunity to respond to the defense;[29] the need for significant new discovery and/or trial preparation;[30] or, the defense requires inquiry into factual issues.[31] Thus, in the federal courts, the ability to raise an affirmative defense outside of the answer will largely depend on the absence or presence of prejudice to the opposing party, although the degree of delay may also factor into the analysis.[32]

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[27] Fed. R. Civ. P. 15(a) has been used to preserve affirmative defenses even when a defendant has not sought to amend its answer. *See Charpentier*, 937 F.2d at 863-64 (defense of immunity was not waived even though it was raised only in a trial brief; the court could nonetheless have permitted a curative amendment of the answer); *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1551 (11th Cir. 1991) (argument that affirmative defense omitted from answer should be waived is moot because had the technical failure of defendant's pleadings been pointed out, the district court would have given the defendant leave to amend its answer), *aff'd*, 507 U.S. 658 (1993); *Block v. First Blood Assoc.*, 763 F. Supp. 746, 748 (S.D.N.Y. 1991) (court interpreted defendant's attempt to raise an affirmative defense as a motion to amend its answer under Rule 15(a)), *aff'd*, 988 F.2d 344 (2d Cir. 1993).

[28] *See, e.g., United States v. Continental Ill. Nat'l Bank and Trust Co.*, 889 F.2d 1248, 1254 (2d Cir. 1989) (delay alone is an insufficient basis to deny opportunity to amend answer); *Block*, 763 F. Supp. at 748 ("a party opposing a proposed [defense] on the basis of delay must also demonstrate either * * * bad faith or undue prejudice").

[29] *See, e.g., Simon*, 891 F.2d at 1159 (defense raised after entry of judgment was not raised at a "pragmatically sufficient time"); *cf. Richmond Steel, Inc. v. Legal and Gen. Assurance Society, Ltd.*, 821 F. Supp. 793, 797 (D.P.R. 1993) (defense not waived where opposing party had ample time and opportunity to respond).

[30] *Rehabilitation Inst. v. Equitable Life Assurance Soc'y*, 131 F.R.D. 99, 102 (W.D. Pa. 1990) (court may find prejudice where significant new trial preparation would be required to address affirmative defense asserted late in the proceedings), *aff'd*, 937 F.2d 598 (3d Cir. 1991); *cf. Block*, 763 F. Supp at 748 (defendant's invocation of an affirmative defense four years after filing its answer and shortly before trial did not constitute prejudice to the plaintiffs because addressing the defense would not cause significant expense to the plaintiffs or result in significant delay in the resolution of the case).

[31] *See, e.g., Lucas*, 807 F.2d at 418 (affirmative defense was not waived when raised for the first time at trial because there was no prejudice to the plaintiffs; the defense involved a purely legal issue that did not require factual proof).

[32] Other *Foman* factors, such as bad faith or futility of amendment may also give rise to waiver, but the Region has not asserted that either consideration is at issue here.

The Part 22 rules governing pleading in EPA administrative penalty proceedings bear some similarities to the Federal Rules of Civil Procedure. The Part 22 rules require matters of defense to be included in the answer. 40 C.F.R. § 22.15(b).[33] Section 22.15(b) refers to "circumstances or arguments which are alleged to constitute the grounds of defense." The term "grounds of defense" encompasses all manner of defenses, including those traditionally denominated as "affirmative defenses." Like the Federal Rules, the Part 22 rules also provide for amendment of answers. "The respondent may amend the answer to the complaint upon motion granted by the Presiding Officer." 40 C.F.R. § 22.15(e).

The Board's decisions have established that matters required to be included in the answer may be waived, although the Part 22 rules do not expressly provide for a waiver. For example, the Board has noted that if a respondent does not raise ability to pay as an issue in its answer, or fails to provide evidence in support of such a claim during the pre-hearing process, the Region may argue and the Presiding Officer may conclude that an ability to pay claim has been waived. *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994). Similarly, a respondent was not permitted to challenge a factual allegation in a complaint after failing to raise the issue "through the answer, prehearing, and hearing process, only to raise it in a post hearing brief after the opportunity for presentation of evidence had passed." *In re Landfill, Inc.* 3 E.A.D. 461, 466-67 (CJO 1990).

The Board has also expressly adopted the policy behind Fed. R. Civ. P. 15(a) regarding liberal amendment of pleadings and has applied it to administrative adjudications. "[I]t is our view that the policy component of Rule 15(a) should apply to Agency practice. The objective of the Agency's rules should be to get to the merits of the controversy." *Asbestos Specialists*, 4 E.A.D. at 830. *See also In re Wego Chemical & Mineral Corp.*, 4 E.A.D. 513, 525 (EAB 1993) ("the purpose of pleading

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[33] Statements regarding defenses are just one category of items required to be included in an answer under section 22.15(b):

> The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. * * * The answer shall also state (1) the circumstances or arguments which are alleged to constitute the grounds of defense, (2) the facts which respondent intends to place at issue, and (3) whether a hearing is requested.

40 C.F.R. § 22.15(b).

is to facilitate a proper decision on the merits") (citation omitted); *In re Port of Oakland and Great Lakes Dredge and Dock Co.*, 4 E.A.D. 170, 205 (EAB 1992) ("the Board adheres to the generally accepted legal principle that administrative pleadings are liberally construed and easily amended") (citations omitted). Although each of these cases involved amendment of a complaint, the policy of Fed. R. Civ. P. 15(a), and our endorsement of it, applies equally to answers.[34]

Our rules depend on the presiding officer to exercise discretion throughout an administrative penalty proceeding. The presiding officer is authorized to "[r]ule upon motions, * * * dispose of procedural requests, * * * [h]ear and decide questions of facts, law, or discretion * * * and [d]o all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by [40 C.F.R. Part 22]." 40 C.F.R. § 22.04(c). *See also In re J.V. Peters & Co.*, 7 E.A.D. 77, 96 (EAB 1997) (recognizing the presiding officer's discretion in shaping the conduct of the hearing). This authority includes the power to determine timeliness on matters of pleading, including the assertion of defenses.

Thus, it is the role of the presiding officer in the first instance to weigh the potentially competing concepts of waiver and liberal amendment of pleadings in making timeliness determinations. The presiding officer should make such determinations with due regard to issues of delay and prejudice to the opposing party. Avoidance of undue delay is contemplated by the regulatory obligations at 40 C.F.R. § 22.04(c). Evaluation of prejudice has been a factor in the Board's decisions permitting liberal amendment of complaints. *See Wego Chemical*, 4 E.A.D. at 525 (respondent did not present any evidence of surprise or disadvantage that would suggest prejudice); *Port of Oakland*, 4 E.A.D. at 206 (respondent did not show prejudice by an amendment to the complaint; respondent had "ample opportunity to rebut" the Region's allegations). The judicial decisions reviewed previously also turned on considerations of prejudice.

Here, we are influenced by the apparent lack of prejudice caused by Lazarus' assertion of the PRA defense. In its response to Lazarus' motion for accelerated hearing, the Region argued that the motion was untimely, but did not specifically claim prejudice. On appeal, the Region has claimed prejudice but has not offered specific evidence of

[34] Fed. R. Civ. P. 15(a) uses the term "pleading" generally rather than "complaint" or "answer". Fed. R. Civ. P. 7(a) refers to both complaints and answers in its definition of pleadings.

such prejudice. From the record before us, it appears that traditional indicators of prejudice are absent.[35] The Region had sufficient opportunity to respond to the defense and in fact provided a response on the merits. Applicability of the PRA defense is in large part a legal issue. The factual materials relevant to the PRA issues were appended to Lazarus' motion and the Region's response as exhibits. The Region did not claim that additional discovery or preparation time would be necessary to resolve the PRA issues. The Region did not claim that consideration of the PRA issues would cause significant delay in the resolution of the claims against Lazarus.

Ultimately, we uphold the Presiding Officer's decision to entertain Lazarus' defense. Although the defense was raised three weeks prior to the hearing, there was no need to delay the hearing in order to consider this particular defense.[36] Finally, although the need to respond to the defense may have been inconvenient for the Region, there was no apparent prejudice.

2. *Applicability of the Paperwork Reduction Act's Public Protection Provision to Counts X and XI*

Counts X and XI of the Region's complaint alleged violations of the requirement to prepare and maintain annual documents on the disposition of PCBs at Lazarus' facility for the years 1978-1988.[37] *See* 40 C.F.R. § 761.180(a) (codified prior to 1982 at 40 C.F.R. § 761.45(a)). The regulation requires that an annual document be prepared by July 1 of each year. The annual document is to contain summary information on PCBs removed from service, disposed of, or remaining in service over the course of the previous calendar year. 40 C.F.R. § 761.180(a)(2).

The Presiding Officer held that Lazarus could not be assessed a penalty for the violations alleged in Counts X and XI of the complaint because during the times at which the PCB annual documents for 1978-1988 were due to be prepared (each July 1 from 1979-1989) the OMB control number assigned to the PCB annual document regula-

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[35] Proof of prejudice is not satisfied simply because the opposing party may have greater difficulty in prevailing on the merits. *See Block*, 763 F. Supp. at 748.

[36] The scheduling order issued in this case put the parties on notice that the Presiding Officer had discretion to reject motions as untimely if such motions would delay or interfere with the hearing date.

[37] Count X alleges a violation of 40 C.F.R. § 761.180(a) as applied to calendar year 1988. Count XI alleges violations of the same regulation for calendar years 1978-1987.

tion had not been properly "displayed" in accordance with PRA regulations.[38] The Region appeals this determination. We agree with the Presiding Officer that the Region may not recover penalties for Counts X and XI, but we do so for different reasons and only in part due to a failure to display the OMB control number.

Our analysis of the applicability of the PRA public protection provision as to Counts X and XI addresses three issues raised by the parties. First, we consider the Region's argument that PRA section 3512 does not apply to ICRs made before December 31, 1981. Second, we address the Region's argument that recordkeeping requirements imposed by regulation (such as the PCB annual document regulation) were not covered by the PRA prior to the 1986 PRA Amendments. Third, we review the requirement to display the OMB control number[39] and we assess the means of display actually used by the EPA.

a. *Applicability of the Paperwork Reduction Act's Public Protection Provision to Collections of Information Made Prior to December 31, 1981*

PRA section 3512 expressly limits its applicability to ICRs made after December 31, 1981.[40] Therefore, section 3512 provides no defense to the allegations of Count XI regarding a failure to prepare an annual PCB document for calendar years 1978-1980.[41] For purposes of PRA section 3512, the PCB annual document requirement consti-

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[38] The Presiding Officer upheld Counts VIII and IX of the Region's complaint which alleged violations of the PCB annual document regulation as applied to calendar years 1990 and 1989, respectively, because by the time the annual document was due for calendar year 1989 (*i.e.*, July 1, 1990), there was no question that the requirements for display of the OMB control number had been met. The OMB control number assigned to this regulation was unequivocally displayed as of December 1989. *See* 54 Fed. Reg. 52,716, 52,752 (Dec. 21, 1989). The Presiding Officer assessed a single penalty in the amount of $1,300 for Counts VIII and IX. Neither party appeals the Presiding Officer's decision as to Counts VIII and IX.

[39] We note that there have been no allegations that the PCB annual document requirement is a true "bootleg" request as envisioned by the 1980 Congress. *See supra* n.20. The record suggests that the OMB approval process was adhered to and the PCB annual document requirements were actually approved. Thus, it is only the display of the OMB control number that is at issue.

[40] The legislative history indicates that the effective date for section 3512 was delayed in order to enable agencies to "secure approval of all essential [ICRs]" prior to that date. H.R. Rep. No. 96-835, at 30 (1980).

[41] In addition to the special effective date of section 3512, we note that the 1980 PRA was enacted on December 11, 1980 and the overall effective date for the Act was April 1, 1981. Thus, the violations alleged for calendar years 1978 and 1979 are wholly outside the reach of the PRA.

tutes an ICR[42] that is "made" on July 1 of each year. The PCB annual document requirements for 1978, 1979, and 1980 were made on July 1, 1979, July 1, 1980, and July 1, 1981, respectively. As each of these ICRs was made prior to the effective date of section 3512, the defense provided therein is not available. *See Salberg v. United States*, 969 F.2d 379, 384 n.2 (7th Cir. 1992) (PRA public protection provision has no bearing on failure to file income tax return for 1980 because section 3512 only applies to information requests made after December 31, 1981).

We find that Lazarus may not assert a PRA defense to the portion of Count XI that alleges a failure to prepare a PCB annual document for calendar years 1978-1980.[43]

b. *Applicability of the Paperwork Reduction Act's Public Protection Provision to Rule-Based Collections of Information Prior to Enactment of the Paperwork Reduction Reauthorization Act of 1986*

The Region argues on appeal that prior to the effective date of the 1986 PRA Amendments, the PCB annual document requirement did not constitute an ICR and therefore the public protection provision does not provide a potential defense for Lazarus' failure to prepare or maintain the required documents.

The Region's theory seeks to apply an interpretation of the 1980 PRA that was adopted and advocated by OMB in its original regulations implementing the PRA.[44] Had we been asked to review this case while OMB's original regulations were in force, we might well have upheld the Region's theory out of deference to OMB and its delegated authority to interpret and implement the PRA. However, as discussed below, the OMB interpretation and original regulations that serve as the basis for the Region's theory were specifically rejected by Congress in the form of the 1986 PRA Amendments. OMB itself

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[42] We address the Region's argument that the PCB annual document requirement did not come within the definition of "ICR" *infra* Section II.A.2.b.

[43] As will be shown *infra* Section II.B.3., a statute of limitations defense is applicable to the allegations in Count XI pertaining to 1978-1980.

[44] 47 Fed. Reg. 39,515 (Sept. 8, 1982) (proposed rule); 48 Fed. Reg. 13,666 (Mar. 31, 1983) (final rule). For an in-depth discussion of the debates within the executive branch that preceded the original regulations, *see* William F. Funk, *The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law*, 24 Harvard J. on Legis. 1, 36-58 (1987).

acknowledged the Congressional correction. We see no justifiable reason to use a case initiated in 1993 to resurrect an interpretation that was rejected by Congress and apparently abandoned by OMB over ten years ago.

When OMB originally promulgated regulations to implement the 1980 PRA, it determined that the statutory definition of ICR did not include paperwork requirements imposed by regulations that had been subject to "notice and comment" rulemaking. Instead, OMB used the term "collection of information requirement" ("COIR") to refer to "notice and comment" regulations imposing paperwork activities.[45] OMB's original regulations established COIRs and ICRs as distinct types of collections of information:

> "Collections of information" are of two mutually exclusive types: "collection of information requirements" and "information collection requests."
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> * * * * * * *
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> "Collection of information requirement" is the term used for the collection of information by means of agency rule adopted after public notice and comment.
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> * * * * * * *
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> "Information collection request" means the method by which an agency communicates the specifications for a collection of information to potential respondents, including a * * * reporting or recordkeeping requirement * * *.

48 Fed. Reg. 13,666, 13,691-92 (Mar. 31, 1983) (originally codified at 5 C.F.R. §§ 1320.7(c), (d) & (l)). Under OMB's original regulations, the PCB annual document requirement met the definition of a COIR, as it imposed a collection of information (*i.e.*, recordkeeping) and was

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[45] The phrase "collection of information requirement" appears in section 3504(h) of the 1980 PRA, but it is not a defined term. OMB presumed that the phrase was meant to specifically refer to collections of information found in regulations that had been promulgated by notice and comment rulemaking pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. By default, the term ICR would apply to all other collections of information. OMB thus established two subcategories of collections of information, *i.e.*, ICRs and COIRs, in its original regulations. *See* 47 Fed. Reg. 39,515, 39,520 (Sept. 8, 1982) (explaining derivation of the regulatory distinction between information "requests" and "requirements").

promulgated through notice and comment rulemaking. Accordingly, because ICRs and COIRs were mutually exclusive categories, the original regulations would not have classified the PCB annual document requirement as an ICR.

OMB required all collections of information (ICRs and COIRs) to be submitted for review and approval, and agencies were required to display control numbers for both COIRs and ICRs:

> 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 * * *.

48 Fed. Reg. at 13,690 (previously codified at 5 C.F.R. § 1320.4(a)).

The principal consequence of the distinction between ICRs and COIRs was that the public protection provision did not apply to COIRs to the same extent as for ICRs. In the preamble to the final rule, OMB noted that section 3512 refers to "information collection requests" on its face, and thus determined that the section must exclude COIRs in light of the different regulatory definitions of COIR and ICR:

> Section 3512 refers specifically to "information collection requests" — a term which, as defined in § 1320.7 of this rule, does not encompass collections of information by means of regulation adopted after public notice and comment.

48 Fed. Reg. at 13,671. As a consequence of this interpretation, the protection afforded by section 3512 in cases involving COIRs was sharply circumscribed.

The limitation on the use of the public protection provision resulting from OMB's ICR/COIR distinction was manifested in OMB's original regulations. The regulations established two different standards for public protection depending on whether the paperwork requirement involved was an ICR or a COIR. In cases involving ICRs, the regulation mirrored the statutory language of section 3512. *See* 48 Fed. Reg. at 13,690 (previously codified at 5 C.F.R. § 1320.5(a)). However, for COIRs, the regulation dropped the statutory control number test and provided protection from penalties only if the paperwork requirement had actually been disapproved by OMB:

> Notwithstanding any other provision of law, no person shall be subject to any penalty for failure to comply with any collection of information require-ment *if the requirement has been disapproved by OMB*, * * *.

48 Fed. Reg. at 13,690 (previously codified at 5 C.F.R. § 1320.5(b) (emphasis added)). Thus, OMB's original regulatory scheme was fairly clear that an agency's failure to display a control number on a COIR (such as the PCB annual document regulation) did not give rise to a defense for a member of the public who failed to comply with the underlying regulation.[46]

In developing the original regulatory scheme discussed above, OMB acknowledged that it had difficulty determining how paperwork requirements such as recordkeeping obligations imposed through regulations ought to be treated. In its proposed rule, OMB made reference to a memorandum prepared by the Department of Justice's Office of Legal Counsel that found "no specific indication that Congress contemplated the assignment of control numbers to regulations." 47 Fed. Reg. 39,515, 39,517 (Sept. 8, 1982). In the same discussion, OMB recognized that:

> The control number serves as an integral part of the Act's protections and provides the public with an easy method for identifying what Congress described as "bootleg" requirements. By its terms, the public protection clause applies to requirements both to "maintain" and to "provide" information, i.e., to both recordkeeping and reporting requirements.

Id. at 39,518. OMB ultimately decided to require control numbers for all paperwork requirements but promulgated different public protection rules for ICRs and COIRs. OMB described these issues in the pre-

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[46] However, we are not aware of any instances in which OMB's original regulatory scheme on ICRs and COIRs was upheld in an enforcement context. The parties have not alerted us to any judicial or administrative decisions analyzing the availability of the public protection defense under OMB's ICR/COIR distinction in the original regulations. We independently note that *United States v. Smith*, 866 F.2d 1092 (9th Cir. 1989), involved the application of section 3512 in a 1984 enforcement action for failure to comply with a Forest Service regulation that had been promulgated through notice and comment rulemaking (*i.e.*, a COIR). Through statutory interpretation and without reference to the OMB regulations, *Smith* held that the Forest Service regulation was an ICR within the meaning of the PRA, and thus was subject to the section 3512 defense. In a footnote, the court acknowledged the existence of the original OMB regulations and noted, "these [OMB's] regulations may to some extent be inconsistent with 44 U.S.C. § 3512. See 5 C.F.R. § 1320.5 [public protection regulation]." *Smith*, 866 F.2d at 1098 n.7.

amble to the final rule as "difficult to decide under the language of the Act." 48 Fed. Reg. 13,666, 13,671 (Mar. 31, 1983).

In 1986, however, Congress specifically amended the PRA in response to OMB's original interpretation and regulations on section 3512. The amendments eliminated the possibility of disparate treatment for ICRs and COIRs under the public protection provision. As discussed below, the legislative history of the 1986 PRA Amendments and OMB's subsequent description of the legislative action indicate that the 1986 PRA Amendments were intended to clarify the original intent of Congress in the 1980 PRA. Because the amendments constituted a clarification rather than a change, we may look to the amended language as a guide in interpreting the pre-amendment language.

The 1986 PRA Amendments amended the statutory definition of "information collection request" as follows:

> [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[.]

See 1986 PRA Amendments § 812(1) (previously codified at 44 U.S.C. § 3502(11)) (emphasis added). The insertion of the phrase "collection of information requirement" into the definition of "information collection request" eliminated the possibility of subcategorizing collections of information as OMB had done in its original regulations.

The legislative history regarding this particular amendment indicates that Congress was directly responding to the statutory interpretation incorporated into OMB's original regulations that resulted in a distinction between ICRs and COIRs for purposes of the public protection provision. The legislative history also indicates that the 1986 amendment was designed to clarify Congress' original intent in the 1980 PRA:

> The Department of Justice, in a 1982 opinion, seized upon the term "collection of information requirement" in section 3504(h) to infer that such requirements were to be completely distinguished from "information collection requests," the term generally used in the rest of the Act. "*Collection of information requirements*" *should be construed instead as a subset of* "*information collection requests*" * * *. Adding the phrase "collection

> of information requirement" to the definition of the term "information collection request" ensures that the two terms are treated the same way under the Act * * *.

S. Rep. No. 99-347, at 52 (1986) (emphasis added).

> The Committee amended the definition of "information collection request" to include the term "collection of information requirement," * * *. This amendment *clarifies* what the term "collection of information requirement" was intended to mean when the act was passed in 1980.
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> * * * * * * *
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> The law was intended to be comprehensive in its coverage of federally sponsored "collections of information." * * * The notion the law was dedicated primarily to "Forms, questionnaires, and surveys" and not to other instruments such as reporting, recordkeeping, and disclosure requirements * * * is a fundamental misreading of what the law states, *what the Congress of 1980 intended, and what this Committee affirms in the amendments of 1986* * * *.

S. Rep. No. 99-347, at 122 (1986) (additional views of Sen. Chiles) (emphasis added).[47]

> [T]he potential loophole to section 3512, the public protection section of the act, has been closed. That provision of the law declares that information requests, whether they are forms, recordkeeping requirements, or regulations, must display a control number indicating they have been checked for need. Absent such a control number the request is a "bootleg" and can be ignored by the public. * * * The Justice Department issued a legal opinion in June 1982 which purported to interpret the paperwork statute. A major effect of that ruling was to confuse the public over what paperwork requirements were and were not covered by the public protection section. The 1986 amendments *clarify Congress' original intent.*

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[47] Senator Chiles was the principal sponsor of this portion of the 1986 PRA Amendments and was particularly interested in the proper operation of the public protection provision.

132 Cong. Rec. S16,740 (daily ed. Oct. 16, 1986) (statement of Sen. Chiles) (emphasis added).

Under appropriate circumstances, amendments to statutes can be used to interpret pre-amendment language. *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367, 380-81 (1969) ("subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction"); *Boddie v. American Broadcasting Co.*, 881 F.2d 267, 269 (6th Cir. 1989) (subsequent legislation may be considered when searching for the intent or purpose of a statute); *Callejas v. McMahon*, 750 F.2d 729, 731 (9th Cir. 1984) (court looked to a statutory amendment of a provision to determine the proper interpretation of the pre-amendment version of the provision). Federal courts have applied this rule of statutory interpretation in determining whether certain activities came within the purview of a statute prior to an amendment.

The courts distinguish between statutory changes and clarifications. "The mere fact of an amendment itself does not indicate that the legislature intended to change a law." *Callejas*, 750 F.2d at 731. If a statutory amendment is in the nature of a clarification, the clarified provision may be applied to situations which arose prior to amendment. If the amendment is in the nature of a change to the statute, however, the new statutory language is inapplicable to the pre-amendment period. For example, in *Callejas*, the statutory amendment at issue was held to be a "legislative interpretation or clarification of the original act." *Id*. Therefore, the express language of the amended statute was also applied to the pre-amendment period. In *United States v. Monroe*, 943 F.2d 1007, 1015-16 (9th Cir. 1991), the subsequent amendment of a criminal statute was consulted and given substantial weight in the court's determination that the defendant's conduct was covered by the prohibitions of the pre-amendment statute. The court noted that the amendment was intended as a clarification of pre-existing law. *Id*. at 1016. In contrast, *Boddie* found that an amendment's elimination of a statutory right to bring suit was in the nature of a change rather than a clarification and therefore the amendment did not affect the plaintiff's right to maintain an action initiated prior to the amendment. *Boddie*, 881 F.2d at 269.

The court decisions also indicate that legislative history may be consulted in determining whether a statutory amendment is a clarification or a change. *See Boddie*, 881 F.2d at 269 (legislative history consulted in determining that statutory amendment was not a clarification); *Monroe*, 943 F.2d at 1016 (legislative history of an amendment "makes clear that Congress intended to clarify pre-existing law").

Similarly here, the legislative history regarding the 1986 amendment to the definition of ICR and the effect of that amendment on the interpretation of PRA section 3512 suggests that the 1986 amendment was intended as a clarification of the original intent of the 1980 PRA.

OMB's own assessment of the effect of the 1986 PRA Amendments is consistent with the above analysis. In the preamble to its proposed regulations on the 1986 PRA Amendments, OMB acknowledged the character of the amendment to the definition of ICR:

> The 1986 amendment to 44 U.S.C. 3502(11) *states more explicitly the original intent* of the Paperwork Reduction Act. This 1986 amendment *clarifies* that a "collection of information requirement" is a type of "information collection request." This *clarification* is intended to ensure that both an "information collection request" and a "collection of information requirement" are treated in the same manner under the Paperwork Reduction Act.

52 Fed. Reg. 27,768 (July 23, 1987) (emphasis added). OMB also revised the regulation implementing the public protection provision so as to ensure that the section 3512 defense would be applied in the same manner in all cases:[48]

> 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;
>
> * * * * * * *
>
> The failure to display a currently valid OMB control number for a collection of information contained in a current rule does not, as a legal matter, rescind or amend the rule; however, its absence will alert the public that * * * the portion of the rule containing the collection of information has no legal force and effect and the public protection provisions of 44 U.S.C. 3512 apply.

[48] OMB did not provide for a transition period or otherwise suggest that the original regulations regarding public protection were to have any continued validity or application after promulgation of the revised regulations.

53 Fed. Reg. 16,618, 16,624 (May 10, 1988) (previously codified at 5 C.F.R. § 1320.5(a)). The preamble to the final revised regulations explained:

> [A]ll of the provisions of the Act apply to any collection of information, whether called for by a printed form, oral question, or a proposed or current rule. These provisions include, among many, the public protection provisions of the Act * * *.

53 Fed. Reg. at 16,621.

Thus, upon consideration of the 1986 PRA Amendments, relevant legislative history, and OMB's amended PRA regulations, we reject the Region's argument and find that section 3512 of the PRA is applicable to the collections of information required by the PCB annual document regulation at 40 C.F.R. § 761.180(a), regardless of the fact that the annual document regulation was promulgated by notice and comment rulemaking. The protection provided by PRA section 3512 applies to these collections of information made both before and after the 1986 PRA Amendments.

Lazarus is therefore not barred from asserting a PRA defense to those portions of Count XI which allege a failure to prepare an annual PCB document for years preceding the enactment of the 1986 PRA Amendments. Lazarus' ability to prevail on this defense, however, is subject to an analysis of the heart of the section 3512 defense, *i.e.*, the adequacy of the display of the OMB control number assigned to the PCB annual document regulation during the time period in question.

c. *"Display" of OMB Control Numbers on the PCB Annual Document Regulation*

The defense provided by PRA section 3512 is predicated on the lack of "display" of an OMB control number.[49] The ultimate determination of whether Lazarus can prevail under PRA section 3512 and avoid a penalty assessment for the violations alleged in Counts X and XI (excluding 1978-1980) thus turns on an analysis of the "display" requirement and the means by which EPA displayed the OMB control number for the PCB annual document regulation.

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[49] The 1986 PRA Amendments and legislative history reinforce the notion that display of the OMB control number is required for all types of collections of information. We note that the Region has not argued that OMB approval alone, without display of the control number, is sufficient to overcome operation of the public protection provision.

Neither the 1980 PRA nor the 1986 PRA Amendments define the term "display." However, "display" was consistently defined in OMB's 1983 and 1988 regulations. The portion of the definition that is relevant to this case reads:

> "Display" means:
>
> * * * * * * *
>
> (2) In the case of collections of information published in regulations, guidelines, and other issuances in the Federal Register, to publish the OMB control number in the Federal Register (as part of the regulatory text or as a technical amendment[50]) and ensure that it will be included in the Code of Federal Regulations if the issuance is also included therein; * * *.

48 Fed. Reg. 13,666, 13,691 (Mar. 31, 1983) (final regulations implementing the 1980 PRA) (section previously codified at 5 C.F.R. § 1320.7(f)); 53 Fed. Reg. 16,618, 16,625 (May 10, 1988) (final regulations implementing the 1986 PRA Amendments) (section previously codified at 5 C.F.R. § 1320.7(e)). Thus, at a minimum, the regulatory definition of "display" contemplates publication in the Federal Register. Lazarus and the Region differ in their views of the method, format, and content required for such publication.

The factual record to be considered in assessing the EPA's "display" of the OMB control number for the PCB annual document regulation is apparently not in dispute. During the time period at issue in this case, the OMB control number appeared in the Federal Register as follows:

1) In February 1986, a short notice of OMB approval of paperwork requirements appeared in a Federal Register document entitled "Agency Information Collection Activities Under OMB Review." The Federal Register document primarily consists of two abstracts describing proposed ICRs wholly unrelated to PCBs or the regulation at issue in this case. The approval notice which apparently applies to the PCB annual document regulation appears toward the end of the Federal Register document and reads in full:

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[50] A technical amendment is a means of implementing non-substantive changes to a regulation, such as renumbering or reorganization of C.F.R. sections, making conforming changes for purposes of consistency with other regulations, etc.

> EPA #0583; Records of PCB Storage and Disposal, was approved 12/10/85 (OMB #2070-0061; expires 12/31/88).

51 Fed. Reg. 6928, 6929 (Feb. 27, 1986). This brief approval notice does not indicate what regulations are involved, either by providing a regulatory citation or a textual description of the requirements.

2) In October 1988, a similarly brief notice of OMB approval of paperwork requirements appeared in the Federal Register:

> EPA ICR #0583; Records of PCB Use, Storage and Disposal; was approved 9/21/88; OMB #2070-0061; expires 9/30/91.

53 Fed. Reg. 41,236 (Oct. 20, 1988). Again, this notice appeared without specific reference to the regulations involved. The October 1988 Federal Register document also contained an abstract of a proposed ICR unrelated to PCBs. In addition, four other short OMB approval/disapproval notices appeared for unrelated paperwork requirements.

3) In December 1989, EPA promulgated a substantial revision to the PCB regulations at 40 C.F.R. Part 761. In the Federal Register document announcing the final rule, a notice of OMB approval appeared following the regulatory text for 40 C.F.R. § 761.180:

> Approved by the Office of Management and Budget under control numbers 2070-0061 and 2070-[0112]

54 Fed. Reg. 52,716, 52,752 (Dec. 21, 1989). This Federal Register document deals exclusively with PCB regulations. The full text of the PCB annual document requirement and its citation are provided in addition to the OMB control number.

4) In the 1990 edition of the C.F.R., the notice of OMB approval that was published in the December 1989 Federal Register was also published at 40 C.F.R. § 761.180, following the text of the PCB annual document regulation.

The legal arguments in the parties' briefs are tailored in light of the specific instances of publication of the OMB control number outlined above. The Region argues that any publication of the OMB control number in the Federal Register meets the "display" requirement.

It insists that the short notices published in 1986 and 1988 achieved "display" of the control number for purposes of PRA section 3512. The Region apparently ignores the fact that these short notices provide no context for the OMB approval and do not even identify which regulations are implicated. Lazarus argues that the OMB regulation defining "display" unambiguously requires that the OMB control number appear in the regulatory text of the PCB annual document regulation in both the Federal Register and in the C.F.R. Unless there has been publication in both sources, Lazarus contends that the PRA's public protection provision prevents the imposition of penalties for a failure to comply with a paperwork requirement. The Presiding Officer held that the control number must appear in the text of the regulation. Because the OMB control number for the PCB annual document regulation did not appear in the regulatory text (in either the Federal Register or the C.F.R.) until December 1989, the Presiding Officer held that the Region could not recover a penalty for violations of the PCB annual document regulation for years prior to 1989. Accordingly, the Presiding Officer dismissed Counts X and XI of the complaint.

Our view of the OMB control number "display" issue is somewhat different from that of the parties and the Presiding Officer. Our analysis of the availability of the PRA public protection provision is divided into two time periods: (1) PCB annual documents due prior to the first documented publication of the OMB control number in the Federal Register in February 1986 (*i.e.*, annual documents for calendar years 1981-1984), and (2) PCB annual documents due after the February 1986 notice, but before the December 1989 notice (*i.e.*, annual documents for calendar years 1985-1988).

(1) *No Display: PRA Defense is Available for Alleged Violations of the PCB Annual Document Regulation in Calendar Years 1981-1984*

The Region has not asserted that an OMB control number for the PCB annual document regulation was displayed in any manner prior to 1986.[51] Because the record is devoid of evidence of any potential

[51] Instead, the Region argued that prior to 1986, the PCB annual document regulation was not an ICR and therefore was not subject to section 3512 protection. As discussed *supra* in Section II.A.2.b., this theory has been rejected by Congress and apparently abandoned by OMB. We will not resurrect it here. The Region did not present an alternative argument with regard to the display requirement for years prior to 1986.

display of the OMB control number until at least February 1986,[52] the alleged violations of the PCB annual document regulation arising prior to February 1986 are subject to the PRA's public protection provision. Lazarus is therefore not subject to a penalty for failure to maintain or provide the information required by the PCB annual document regulation for calendar years 1981-1984 (resulting in annual document obligations every July 1 from 1982-1985) in light of the total lack of display of an OMB control number during this time period.

(2) *Inadequate Display: PRA Defense is Available for Alleged Violations of the PCB Annual Document Regulation in Calendar Years 1985-1988*

In order to determine whether a section 3512 defense is available for alleged violations of the PCB annual document regulation after the first publication of the OMB control number in the Federal Register in February 1986, we must determine what the PRA requires for display and whether the means of display at issue in this case satisfy the statutory requirement. Our inquiry takes place in the absence of a legislative definition of "display" or relevant judicial interpretations. Because OMB is authorized to interpret and implement the PRA, we look to OMB's pronouncements on the subject of "display" as principal guidance.

There are two sources from OMB providing interpretations of "display." The first source is OMB's regulation, which formally defines "display." *See supra* Section II.A.2.c. The second source is an exchange of correspondence between the General Counsels of OMB and EPA in 1993 that purports to interpret the statutory and regulatory requirements for display and specifically assesses certain means of

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[52] The Agency published substantive and technical amendments to the PCB annual document regulation in the Federal Register on three occasions after the enactment of the 1980 PRA and before February 1986. None of these Federal Register notices included the OMB control number for the regulation. *See* 47 Fed. Reg. 19,526, 19,527 (May 6, 1982) (technical amendment); 47 Fed. Reg. 37,342, 37,360 (Aug. 25, 1982) (technical amendment); 49 Fed. Reg. 28,172, 28,191 (July 10, 1984) (substantive amendment; addition of introductory text).

As noted *supra*, the requirement to display the OMB control number was technically applicable to the PCB annual document regulation regardless of whether the EPA was relying on OMB's original distinction between ICRs and COIRs. *See* 48 Fed. Reg. 13,666, 13,690 (Mar. 31, 1983) (previously codified at 5 C.F.R. § 1320.4(a)) (all collections of information are subject to the display requirement).

display used by EPA.[53] The General Counsels' correspondence has been made part of the record in this case. We analyze the General Counsels' correspondence because the Presiding Officer addressed it and both parties have presented arguments in their briefs regarding its relevance and the deference it should (or should not) be accorded.

As will be shown in the detailed analysis that follows, OMB's opinion, expressed through the General Counsels' correspondence, is entitled to some deference. However, the fact pattern in this case regarding the format and context in which the OMB control number for the PCB annual document requirement was published does not match the fact patterns described in the General Counsels' correspondence. Therefore, the General Counsels' correspondence does not directly apply in this case, and our holding does not depend on our analysis of the deference due the correspondence. Further, the General Counsels' correspondence, OMB's regulations, and the PRA itself suggest that the means of display at issue in this case were inadequate. Thus, we find that the OMB control number was not adequately displayed for the PCB annual document regulation and a PRA defense applies in this case. Our analysis follows.

The Region asserts that the General Counsels' correspondence establishes that the February 1986 and October 1988 Federal Register notices of OMB approval satisfy the statutory and regulatory requirements for control number "display." Before we address whether the correspondence in fact supports the conclusion suggested by the Region, we consider whether the interpretation of "display" found in the General Counsels' correspondence should receive deference.

In assessing the General Counsels' correspondence, we are guided by the doctrine of administrative deference as announced by the Supreme Court of the United States and as applied by the judiciary in its review of agency interpretations.[54] We use this analysis solely to

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[53] Letter from Gerald H. Yamada, Acting General Counsel, United States Environmental Protection Agency, to Robert G. Damus, Acting General Counsel, Office of Management and Budget (May 26, 1993) (Attach. F to Complainant's Response to Respondent's Motion for Accelerated Decision); Memorandum 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) (Ex. C. to Complainant's Brief Accompanying Notice of Appeal) (collectively "General Counsels' correspondence").

[54] The doctrine of administrative deference as applied by the courts is based on the Constitutional principle of separation of powers. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 866 (1984). Thus, the deference analysis which follows is not directly applicable to an agency's review of another agency's interpretation.

assist our decisionmaking in this matter[55] and do not purport to be issuing definitive rules on the application of the deference doctrine in either interagency reviews or judicial review of agency decisionmaking.

The modern framework for administrative deference was established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Chevron* noted that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer * * *." *Id.* at 844. Under *Chevron*, an agency's interpretation of a statute is entitled to deference "if the statute is silent or ambiguous with respect to the specific issue," and the interpretation proffered by the agency is reasonable. *Id.* at 843-44.

The rule of deference also applies to agency interpretations of regulations. In fact, an agency's interpretation of its own regulation is typically entitled to more deference than an interpretation of a statute. *Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order"); *Martin v. Occupational Safety and Health Review Comm.*, 499 U.S. 144, 151 (1991) ("the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers"); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (an agency's interpretation of a regulation must be accorded "substantial deference" and "controlling weight" unless "plainly erroneous or inconsistent with the regulation"). The heightened deference accorded to interpretations of regulations is especially appropriate where an agency's special expertise is required to administer a technical regulatory program. *Thomas Jefferson Univ.*, 512 U.S. at 512; *Martin*, 499 U.S. at 151; *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980) (Federal Reserve Board's administrative expertise in implementing the Truth in Lending Act was basis for according deference to its interpretation of regulations); *Beazer East, Inc. v. EPA*, 963 F.2d 603, 607 (3d Cir. 1992) ("complex nature of environmental statutes and regulations and the specialized knowledge necessary to construe them" was reason for according deference to EPA).

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[55] Parties in cases before the Board may not ordinarily raise the doctrine of administrative deference as grounds for requiring the Board to defer to an interpretation of statutory or regulatory requirements advanced by any individual component of the EPA. This rule applies because the Board serves as the final decisionmaker for EPA in cases within the Board's jurisdiction. *See In re Mobil Oil Corp.*, 5 E.A.D. 490, 509 n.30 (EAB 1994). In this case, however, the issue at hand involves a statutory and regulatory program that is delegated to another federal agency, namely, OMB. In light of the unusual issues present in this case, we believe that a deference analysis serves as a useful guide.

However, the courts have held that not all agency interpretations are entitled to deference, and of those that are, not all are accorded the same weight. *See Wolpaw v. Commissioner*, 47 F.3d 787, 790 (6th Cir. 1995) (summary of various deference standards). In determining the appropriate degree of deference for any particular agency interpretation of a statute or regulation, the courts make distinctions based on the source and form of the interpretation. In general, interpretations announced through notice and comment rulemaking are entitled to a high degree of deference.[56] *Atchison, Topeka and Sante Fe Ry. v. Pena*, 44 F.3d 437, 442 (7th Cir. 1994) (the notice and comment rulemaking process is what entitles agency interpretations to deference), *aff'd sub nom. Brotherhood of Locomotive Engineers v. Atchison*, __U.S.__, 116 S.Ct. 595 (1996). Interpretations made in the context of administrative orders[57] and agency adjudications[58] are also generally well-received.

Less formal sources of interpretations do not receive deference as readily as formal regulations and orders, but they may be influential nonetheless. *Martin*, 499 U.S. at 157 (informal interpretations are entitled to some weight, but not the same degree of deference as those "that derive from the exercise of * * * delegated lawmaking powers," such as promulgated regulations or adjudications);[59] *Massachusetts v. Federal Deposit Ins. Corp.*, 102 F.3d 615, 621 (1st Cir. 1996) (formal interpretations expressed through rulemakings and adjudications are accorded *Chevron* deference; less formal interpretations such as policy statements, guidelines, staff instructions, and litigation positions are not accorded full deference). The degree of deference accorded to

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[56] *See, e.g., Smiley v. Citibank (South Dakota), N.A.*, __ U.S. __, 116 S.Ct. 1730, 1733 (1996) (deference accorded to agency interpretation expressed in "full-dress regulation * * * adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act"); *Chevron*, 467 U.S. 837 (deference accorded to EPA's interpretation of "stationary source" under the Clean Air Act as set forth in a final regulation).

[57] *See, e.g., Udall*, 380 U.S. at 16-17 (deference accorded to agency interpretation of regulation announced in administrative orders and subsequent regulations).

[58] *See, e.g., Thomas Jefferson Univ.*, 512 U.S. at 513 (deference accorded to regulatory interpretation adopted by Secretary of Health and Human Services in the context of an administrative appeal); *Ahmetovic v. Immigration and Naturalization Serv.*, 62 F.3d 48, 51 (2d Cir. 1995) (statutory interpretation announced by Board of Immigration Appeals is entitled to deference); *Beazer East*, 963 F.2d at 609-10 (EPA is entitled to develop an interpretation through adjudication rather than notice and comment rulemaking; deference accorded to decision of Administrator in an adjudicatory appeal).

[59] In a case preceding *Martin*, the Supreme Court applied a *Chevron* analysis to a statutory interpretation expressed in opinion letters and agency practice. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633 (1990).

such an interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Variants of the *Skidmore* factors are used by the courts in assessing the appropriate level of deference to apply to less formal sources of agency interpretations. The factors which influence this assessment include: 1) the interpretation's consistency (or inconsistency) with other interpretations from the same agency; 2) the agency's authority to set policy on the subject of the interpretation; 3) the thoroughness of reasoning evident in the interpretation; and 4) the contemporaneity of the interpretation with the statute or regulation to which it applies.

A consistently held interpretation is likely to obtain deference from a court, whether the form of the interpretation is an administrative practice or an official opinion letter. "[W]e give an agency's interpretations and practices considerable weight * * * where they have been in long use." *Davis v. United States*, 495 U.S. 472, 484 (1990).[60] Conversely, inconsistent interpretations are a leading reason that courts decline to extend deference to an agency interpretation.[61] Change in an agency position, however, is not necessarily fatal as long as the change is neither "arbitrary, capricious or an abuse of discretion." *Smiley*, 116 S.Ct. at 1734 (citation omitted).

An agency's authority to establish substantive policy is a key factor in determining what level of deference to apply to an interpretation. "[I]t is a fundamental principle of construction that the view of the agency charged with administering the statute is entitled to considerable deference." *Warren v. North Carolina Dep't of Human*

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[60] *See also Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 476 U.S. 426, 439 (1986) (FDIC's practice regarding deposit insurance premiums, consistently applied over decades, amounted to an interpretation entitled to "considerable weight"); *Ford Motor Credit*, 444 U.S. at 557 (the statutory and regulatory interpretations expressed in a series of Federal Reserve Board staff opinion letters were entitled to a "high degree of deference" due in part to consistency over time).

[61] *See, e.g., EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257-58 (1991) (policy guideline that contradicts an earlier agency position is of limited persuasive value); *General Electric Co. v. Gilbert*, 429 U.S. 125, 142-43 (1976) (EEOC guideline not accorded deference due in part to its contradiction of an earlier agency announcement of policy); *Atchison*, 44 F.3d at 442 (new interpretive rule that conflicted with 23 years of enforcement practices receives no deference); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 692 (3d Cir. 1994) (opinion letters of the Department of Labor's Wage and Hour Division were not accorded weight because interpretations were inconsistent).

Resources, 65 F.3d 385, 391 (4th Cir. 1995) (according deference to an interpretation in administrative notices issued by USDA).[62]

Thoroughness and quality of reasoning has been a factor in some cases considering less formal sources of interpretation. The Supreme Court's decision in one case to defer to an agency policy expressed through opinion letters and agency practice was influenced by the reasonableness of the policy and the quality of the agency's judgments in its practical experience. *LTV Corp.*, 496 U.S. at 651.[63] A lack of thoroughness or reasonableness has been a factor in decisions declining to extend deference to interpretations adopted to address specific situations.[64]

The contemporaneity of an agency interpretation with enactment of a statute or promulgation of a regulation can also be an important, but not necessarily dispositive, factor in assessing the level of deference to apply to less formal sources of interpretations.[65, 66]

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[62] *See also Ford Motor Credit*, 444 U.S. at 566 (staff opinions and letters prepared by the Federal Reserve Board are entitled to deference because Congress expected the Board and its staff to be the primary source for interpretations and applications of the Act); *Penn Central Corp. v. Western Conference of Teamsters Pension Trust Fund*, 75 F.3d 529, 534 (9th Cir. 1996) (deference is appropriate for ERISA interpretation contained in opinion letter issued by the federal agency responsible for construction and application of the statute); *Rothschild v. Grottenthaler*, 716 F. Supp. 796, 799 n.5 (S.D.N.Y. 1989) (opinion letters of the Department of Education's Office of Civil Rights entitled to deference because that office also promulgated the regulations at issue).

[63] *See also Penn Central*, 75 F.3d at 533 (opinion letter describing hypothetical analogous to factual situation is entitled to deference); *Johnson v. Watts Regulator Co.*, 63 F.3d 1129, 1135 (1st Cir. 1995) (opinion letter interpretation which best advances statutory objective is entitled to deference); *Wolpaw*, 47 F.3d at 794 (IRS interpretation in private letter ruling and regulation was reasonable).

[64] *See, e.g., Arabian Am. Oil Co.*, 499 U.S. at 257 (EEOC guideline adopted during appeals process in a pending case "lack[ed] support in the plain language of the statute"); *Atchison*, 44 F.3d at 442-43 (interpretive rule adopted to respond to adverse decision of court of appeals lacked characteristics of reasonableness for purposes of deference).

[65] *See In re Indianapolis Power & Light Co.*, 6 E.A.D. 23, 30 (EAB 1995) (contemporaneous statement of senior EPA manager with primary responsibility for developing a regulation was entitled to significant weight in interpreting the regulation). Note however, that at least with regard to interpretations expressed in formal regulations, the Supreme Court has recently held that the temporal relationship between the item being interpreted and the interpretation is not critical. *Smiley*, 116 S.Ct. at 1733.

[66] *See, e.g., Davis*, 495 U.S. at 481-82 ("[i]t is significant that almost immediately following" the enactment of the statute at issue, the agency interpreted the statutory provision as it does now); *Philadelphia Gear*, 476 U.S. at 438 (agency's opinion regarding application of a statutory

Continued

A further description of the General Counsels' correspondence is necessary in order to apply these deference factors to the interpretation of "display" expressed in the correspondence.

The General Counsels' correspondence was initiated in 1993 by the Acting General Counsel of EPA in light of EPA's discovery of several deficiencies in its compliance with PRA requirements. EPA specifically sought a determination from OMB regarding the adequacy of the means used by EPA to display OMB control numbers for certain regulations.[67] The Agency disclosed that OMB control numbers for some regulations had been published in the Federal Register, appearing not in the regulatory text, but in preambles or in separate notices. Moreover, the control numbers for some regulations had not been included in the C.F.R.

The EPA letter suggests that the failure to publish the control numbers in the C.F.R. is of no legal consequence. The letter cites the Federal Register Act, 44 U.S.C. §§ 1501-1511, and federal case law that equates legal notice with publication in the Federal Register alone. The EPA letter asserts that "publication of a control number in the Federal Register * * * provides the regulated community with adequate notice for the purposes of the PRA." Letter from Gerald H. Yamada, *supra* n.53, at 3. The letter also claims that "the regulated community had available to it the necessary information to determine whether [an] ICR had in fact been reviewed and approved by OMB." *Id*. at 4. Finally, the EPA letter states that the Agency's approach to publication of the OMB control numbers satisfies the goals and requirements of OMB's PRA regulations. "[T]he goals of the statute and the regulations were satisfied when the Agency obtained a control number from OMB and the regulated community received notice of OMB's approval and the control number." *Id*. at 5.

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provision as expressed in a meeting with the regulated community just after enactment of the statute was a contemporaneous interpretation and is entitled to deference); *Les v. Reilly*, 968 F.2d 985, 989 (9th Cir. 1992) (agency interpretation during legislative process and memorialized in the legislative history is a contemporaneous construction entitled to great weight); *cf. Arabian Am. Oil Co.*, 499 U.S. at 257 (position expressed in policy guideline 24 years after enactment of a statute was not contemporaneous and not entitled to deference); *Atchison*, 44 F.3d at 442 (interpretation made 23 years after enactment of legislation was not contemporaneous and not entitled to deference); *Reich*, 13 F.3d at 692 (considerable weight withheld from interpretation expressed in opinion letter due in part to a lack of contemporaneity).

[67] The letter from EPA generically describes how notice of OMB control numbers was typically provided. The regulations to which EPA's letter applies are not listed or described with particularity. The EPA letter does not outline the control number publication history for the PCB annual document regulation or any other specific regulation.

OMB responded to the EPA letter as follows:

> [Y]ou requested a determination by OMB as to whether the means employed by EPA in informing potential respondents of the OMB control number for * * * rule-based ICRs satisfied the display requirement of the [PRA] and OMB's implementing regulations.
>
> * * * * * * *
>
> We have carefully considered the information you provided in your * * * letter, including the manner in which EPA has notified potential respondents of the OMB control number through publication * * * in the Federal Register; * * *. [I]t is our determination that the means used by EPA to notify potential respondents of the OMB control number for EPA's rule-based ICRs * * * — notification in the preamble to the final rule or in separate notices in the Federal Register — were sufficient, under the circumstances presented here, to satisfy the requirement of the PRA and OMB's regulations.

Letter from Robert G. Damus, *supra* n.53.

Returning now to the deference factors, we review how the General Counsels' correspondence fares under the standards announced by the courts.[68] First, the source of the interpretation is not as favored as a formal regulation or adjudication. The OMB letter is an informal, unpublished piece of correspondence that does not announce general policy, but is a specifically tailored response to EPA's request. Moreover, most of the substantive details that provide the foundation for the interpretation are found in the lengthier EPA letter, not in OMB's response. Second, the opinion expressed in the correspondence could be viewed as deviating from the text of OMB's definition of "display," thus creating a potential inconsistency.[69]

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[68] Technically, it is OMB's opinion which may or may not be entitled to deference. However, OMB's letter specifically references EPA's letter, and we therefore refer to the General Counsels' correspondence as a whole for purposes of this analysis.

[69] Recall that OMB's definition of "display" calls for an agency "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 * * *." 48 Fed. Reg. 13,666, 13,691 (Mar. 31, 1993). The EPA letter could be read as requesting a determination that all of the words following "in the Federal Register" in the definition of "display" are unnecessary in cases where there has been some sort of publication in the Federal Register.

Finally, the correspondence is not contemporaneous with either the enactment of PRA legislation or the promulgation of PRA regulations.

Despite some factors which weigh against according full deference, the correspondence is nonetheless entitled to some weight. Some deference is favored in that the OMB letter purports to interpret a statute that OMB is charged with administering and the statute itself does not provide a definition of "display." Moreover, OMB's interpretation of its own regulation is entitled to substantial deference. The correspondence provides an analysis of the purposes of the PRA display requirement and means of providing notice to regulated entities that is consistent with established law on the use of the Federal Register to provide legal notice. OMB's interpretation appears to remain faithful to the purpose of the "display" requirement if not the precise method described by the regulation. In recognition of OMB's primacy on PRA issues and in the absence of judicial or legislative pronouncements on this issue, we believe it is appropriate to accord some deference to OMB's interpretation of "display" as it is expressed in the General Counsels' correspondence.

Just because we find that the OMB's interpretation is entitled to some deference, however, does not mean that we automatically adopt the Region's argument that the General Counsels' correspondence establishes the sufficiency of the means of display used for the PCB annual document regulation. In fact, a close review of the details of the General Counsels' correspondence indicates that OMB's opinion on the sufficiency of EPA's display methods does not extend to the means of display used for the PCB annual document regulation at issue in this case.

EPA's letter to OMB describes two specific forms of notice that were generally provided to the public regarding OMB approval of paperwork requirements. The first form of notice appeared in the preambles to proposed and final rules.[70] The second form of notice was used when seeking reapproval of OMB control numbers on regulations for which there was no substantive change. In the reapproval context, EPA represented that two Federal Register notices typically were issued. An initial Federal Register notice was published when EPA forwarded an approval package to OMB. This initial notice "provided detailed information, including which regulations are involved." Letter from Gerald H. Yamada, *supra* n.53, at 2. A follow-up "short

[70] As previously noted, there was no display of the OMB control number in any preamble during the time period at issue here.

notice" was published in the Federal Register after receiving OMB approval or disapproval. The short notice provided summary information, including the OMB control number.[71] *Id*.

The February 1986 and October 1988 Federal Register notices containing the OMB control number for the PCB annual document regulation at issue in this case are in the form of the follow-up short notices used in the reapproval context. Notably, there is no record of any initial notice providing "detailed information" or identification of the regulations involved. The General Counsels' correspondence suggests that the initial notice and the follow-up short notice *together* constitute an acceptable means of display. This position is logical because absent the initial notice, the follow-up short notice is cryptic at best. The notices here do not even enable the reader to determine what regulations have received PRA approval by OMB. The notices include only the control number, an EPA ICR number, and a title for the ICR. The ICR titles, in this case, are not useful indicators of what regulations have been approved. For example, the ICR in the February 1986 notice is entitled: "Records of PCB Storage and Disposal." 51 Fed. Reg. 6928, 6929 (Feb. 27, 1986). The PCB regulations contain a subpart entitled "Storage and Disposal" but the PCB annual document regulation is not found therein. Thus, it would be nearly impossible for a member of the public to discern that the PCB annual document regulation was covered by the OMB control number that appeared in the 1986 and 1988 Federal Register notices.

We think that Congress and OMB intended control number "display" to be a meaningful means of assessing an agency's compliance with the PRA as to a particular paperwork requirement.[72] This conclusion is not contrary to the opinion expressed in the General Counsels' correspondence. The fundamental premise of the General Counsels' correspondence is that the Federal Register notices provided

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[71] The process described in EPA's letter for providing notice of OMB con- trol number reapproval is largely required by an OMB regulation separate from the "display" regulation. *See* 48 Fed. Reg. 13,666, 13,695 (Mar. 31, 1983) (previously codified at 5 C.F.R. § 1320.14(b)); 53 Fed. Reg. 16,618, 16,629 (May 10, 1988) (previously codified at 5 C.F.R. §§ 1320.14(b) & 1320.15(a)).

[72] EPA's letter to OMB also suggests as much:

> The goals of the PRA are met once OMB assigns a control number to a rule-based ICR and a pervasively regulated community is provided with notice through *adequate publication* of that number.

Letter from Gerald H. Yamada, *supra* n.53, at 4 (emphasis added).

adequate legal notice such that additional publication in the C.F.R. was unnecessary. OMB's determination that EPA satisfied the PRA through its means of display was predicated on the notion that the regulated community had notice of what regulations were approved. The EPA letter specifically represented that the Federal Register notices constituting "display" included information on the regulations involved. OMB's response affirms the adequacy of EPA's efforts to display the control numbers only "under the circumstances presented" in EPA's letter. For the reasons described above, however, the notices at issue in this case do not accord with the circumstances presented in the EPA letter. The opinion from OMB pertains to a means of display that is not evidenced in the facts of this case. Thus, although we accord some deference to the opinion expressed in the General Counsels' correspondence, our resolution of the PRA "display" issue in this case does not depend on the deference analysis. On its face, the General Counsels' correspondence does not appear to provide explicit or implicit approval of the means of display actually used for the regulation at issue in this case.

Upon analysis of the PRA, its implementing regulations, and the informal opinion provided by OMB's General Counsel, we find that EPA's publication of the OMB control number for the PCB annual document regulation in the February 1986 and October 1988 Federal Register notices did not amount to an adequate means of display. On the record before us, the first adequate display of the OMB control number occurred at the time of the December 1989 Federal Register notice. Therefore, the Region may not recover penalties for violations of the PCB annual document requirements due prior to December 1989. This holding covers the annual document requirements for calendar years 1985-1988.

3. *Applicability of the Paperwork Reduction Act's Public Protection Provision to Count VII*

Count VII of the Region's complaint alleged a violation of the requirement to mark the access door to Lazarus' transformer room with a M_L warning as required by 40 C.F.R. § 761.40(j).[73] The regulation requires that "the vault door, machinery room door, fence, hallway, or means of access * * * to a PCB Transformer must be marked with the mark M_L * * *." *Id*.

[73] The symbol "M_L" is a shorthand reference for the PCB warning label which currently appears as Figure 1 to 40 C.F.R. § 761.45 and has been included in the PCB regulations since their original promulgation. *See* 43 Fed. Reg. 7150, 7163 (Feb. 17, 1978).

Lazarus asserts that the marking regulation at 40 C.F.R. § 761.40(j) was never submitted to OMB for review and approval, and does not have an OMB control number.[74] Lazarus notes that no OMB control number for this regulation has been published in either the Federal Register or the C.F.R. Lazarus argues that the EPA has not complied with the PRA and thus, Lazarus is entitled to the protection of PRA section 3512 and cannot be penalized for its failure to place a M_L label on the door to the transformer room.[75]

The Presiding Officer held that PRA section 3512 does not protect Lazarus from penalties for a failure to mark the access door because the marking regulation is not covered by the PRA. The Presiding Officer found that the purpose of 40 C.F.R. § 761.40(j) is to disclose information to the public (*i.e.*, a warning about the presence of PCBs) rather than to the federal government. As such, the marking requirement fell outside the scope of the PRA's definition of "collection of information" at the time of Lazarus' alleged violation. We agree with the Presiding Officer's analysis regarding the character of the door marking requirement. In addition, we find that the marking requirement does not meet the definition of "collection of information" under the PRA because the regulation only requires the dissemination of information supplied by the federal government.

a. *Applicability of PRA Section 3512 to Rules Mandating Disclosure of Information to Third Parties*

In 1990, the Supreme Court of the United States held that PRA section 3512 did not apply to regulations requiring information to be disclosed to third parties:

> [T]he public is protected under the Paperwork Reduction Act from paperwork regulations not issued in compliance with the Act only when those regulations dictate that a person maintain information for an agency or provide information to an agency. By its very terms, the statute's enforcement mechanism does

[74] The Region neither confirms nor denies Lazarus' assertions regarding the approval status of 40 C.F.R. § 761.40(j). For purposes of this decision, we presume that Lazarus' assertions are accurate.

[75] Lazarus also raises a statute of limitations argument with regard to Count VII. We address the statute of limitations issues *infra* Section II.B.

> not apply to rules which require disclosure to a third party rather than to a federal agency.

Dole v. United Steelworkers, 494 U.S. 26, 40 (1990).[76]

Dole points out that ICRs covered by the PRA may involve the provision of information to the federal government either directly or indirectly. *Id*. at 33. Lazarus contends that the M_L marking requirement is an indirect means of providing information to the federal government because the presence of the mark is reviewed during the course of an inspection. In support of its argument, Lazarus cites dicta in *Dole* that suggests that a requirement to retain certain records for purposes of a compliance review would be an example of indirect information gathering that is nonetheless covered by the PRA. *Id*. at 33 n.4.

The *Dole* dicta is not applicable to this case because the purpose of the PCB marking regulation is not to assist EPA in its compliance activities. As the Presiding Officer recognized, the access door marking requirement is a disclosure requirement, designed to provide a warning to any person approaching or entering an area where PCBs are present. The persons who will benefit from the warning may be Lazarus employees, outside contractors, or personnel responding to a fire. *See In re Pacific Refining Co.* 5 E.A.D. 520 (EAB 1994) (regulatory history indicates that primary purpose of 40 C.F.R. § 761.40(j) was to protect fire responders). Although the Agency will look for evidence of compliance with the marking regulation during an inspection, this activity in no way transforms the disclosure requirement into an indirect information-gathering requirement.

We find that the access door marking regulation is a third party disclosure requirement. Although we recognize that Congress changed the PRA in response to the *Dole* decision[77] and the 1995 PRA

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[76] *Dole* reviewed the applicability of the PRA to the Department of Labor's hazard communication standard. The regulation required chemical manufacturers and downstream chemical users to prepare and provide information regarding chemical hazards to workers. The Court held that because the intended recipients of the information were workers rather than the federal government, the hazard communication regulation was not covered by the PRA.

[77] *Dole* was explicitly overruled by Congress during the enactment of the Paperwork Reduction Act of 1995:

> In 1990, the paperwork/regulatory issues, particularly, took on more urgency when the Supreme Court ruled in *Dole v. United Steelworkers of America*, 494 U.S. 26 (1990), on the scope of the paperwork clearance process. * * * [The 1995

Continued

now explicitly covers third party disclosure requirements,[78] the 1995 PRA does not affect our conclusion under the 1980 and 1986 versions of the PRA.[79] *Dole* compels the conclusion that the marking regulation was not covered by the PRA and Lazarus' failure to comply with the regulation was not subject to the protection of PRA section 3512.

b. *Applicability of PRA Section 3512 to Dissemination of Information Supplied by the Federal Government*

We also find that the access door marking requirement is not covered by the PRA under an alternative theory. The regulatory definition of "collection of information" excludes requirements to disseminate information supplied by the federal government:

> The public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public is not included within this definition.

48 Fed. Reg. 13,666, 13,691 (Mar. 31, 1983) (final regulations implementing 1980 PRA); 53 Fed. Reg. 16,618, 16,625 (May 10, 1988) (final

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> PRA] overturns the *Dole* decision and includes third party disclosure requirements within its provisions.

H. Rep. No. 104-37, at 12 (1995).

[78] The 1995 PRA expressly provides that third party or public disclosure requirements are covered by the PRA and are subject to the protection of an amended section 3512:

> [T]he term "collection of information"—
>
> (A) means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless or form or format * * *.

1995 PRA § 3502(3) (codified at 44 U.S.C. § 3502(3)).

> Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this chapter if—
>
> > (1) the collection of information does not display a valid control number * * *.

1995 PRA § 3512(a) (codified at 44 U.S.C. § 3512(a)).

[79] At the time the Region filed its complaint and the Presiding Officer issued the Initial Decision, the 1980 PRA as amended by the 1986 PRA Amendments was in effect. *Dole* was controlling precedent on the applicability of the PRA to third party disclosure requirements.

regulations implementing 1986 PRA Amendments) (section previously codified at 5 C.F.R. § 1320.7(c)(2))[80]. The preamble to OMB's regulations illustrates this exception:

> An example is the warning label on cigarette packages. Although the label is a federally-mandated disclosure, no collection of information is involved, since the persons subject to the requirement need only transmit to the public information supplied by the federal government. * * * [T]he mere transmittal of information supplied by the federal government is not a "collection of information." * * *[D]isclosure and labeling requirements are covered only to the extent that they implicitly or explicitly require a person to collect information for the purpose of the disclosure or labeling.

48 Fed. Reg. at 13,675. The requirement to apply a M_L label on the access door to a room containing PCB transformers is highly analogous to a cigarette warning label. In both cases, the precise information to be included and the exact specifications of the label are supplied by the federal government. The persons subject to these requirements must reproduce this information and disseminate it through prescribed means, but need not independently collect any information.

We are not moved by Lazarus' argument that it might have to "create a label that compiles the required information in the necessary format." Lazarus Inc.'s Notice of Appeal at 8. The M_L mark has been published in the C.F.R. for years. *See supra* n.73. The exact format and design of the mark is supplied in the regulations and requires no review or compilation of other information. Moreover, testimony at the evidentiary hearing indicated that M_L labels were readily available and Lazarus had no difficulty in complying with the marking regulation once it was brought to its attention by the OEPA inspector. Lazarus' Director of Maintenance testified that an electrician applied the M_L label on the access door the very day of the inspection. Tr. at 177.

For the foregoing reasons, we find that the requirement to place a M_L mark on the door to the room containing PCB transformers is not a collection of information under the PRA regulations and therefore the section 3512 defense is not applicable.

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[80] This exclusion was also made part of the most recent PRA regulations, promulgated after enactment of the 1995 PRA. 60 Fed. Reg. 44,978, 44,985 (Aug. 29, 1995) (codified at 5 C.F.R. § 1320.3(c)(2)).

4. *Summary of Decision on Paperwork Reduction Act Issues*

We find that PRA section 3512 bars the Region from recovering penalties from Lazarus for a failure to prepare or maintain PCB annual documents for calendar years 1981-1988. Penalties for calendar years 1981-1984 are barred due to a complete lack of display of an OMB control number for the PCB annual document regulation during the time the annual documents were due to be prepared. Penalties for calendar years 1985-1988 are barred due to inadequate display of the OMB control number. PRA section 3512 does not provide a defense to the Region's allegations of a failure to comply with the PCB annual document regulation for calendar years 1978-1980. In addition, PRA section 3512 does not shield Lazarus from penalties for failure to mark the access door to its transformer room with the M_L label.

B. *Statute of Limitations Issues*

Lazarus claims that the statute of limitations bars the Region from maintaining an action for penalties as to Counts I, VII, and XI. Both parties argue that the doctrine of continuing violations and its impact on the statute of limitations is at issue for all three counts, but they differ as to whether the doctrine gives rise to a defense.

The generic five-year statute of limitations on civil penalty actions at 28 U.S.C. § 2462 applies to the Region's enforcement action against Lazarus.[81] *See 3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994) (28 U.S.C. § 2462 is applicable to TSCA administrative enforcement actions). The statute of limitations bars the government from commencing an action for penalties after the limitations period has expired. The limitations period begins to run when a violation first accrues. The doctrine of continuing violations provides a special rule for determining when a violation first accrues. *Toussie v. United States*, 397 U.S. 112, 115 (1970) (doctrine of continuing offenses essentially extends the limitations period). Under the special accrual rule, the limitations period for continuing violations does not begin to run until an illegal course of conduct is complete. Thus, if the doctrine of continuing violations applies to any of the counts at issue in this case, an

[81] 28 U.S.C. § 2462 reads:

> 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 * * *.

action for civil penalties may be initiated during the period of continuing violations and up to five years after the violations have ceased. *In re Harmon Electronics, Inc.*, 7 E.A.D. 1, 21 (EAB 1997); *see also United States v. Blizzard*, 27 F.3d 100 (4th Cir. 1994) (government may prosecute continuing offenses anytime after the offense begins and for an additional period after the offense ends).

Determining when an action accrues for purposes of the statute of limitations is "subject to numerous different rules, interpretations, and exceptions." *Harmon*, slip op. at 24. The difficulties in analysis for this case are compounded by a lack of clear precedent interpreting and applying the continuing violations doctrine in a statute of limitations context outside of the criminal arena. There are some significant differences in the treatment of civil and criminal statutes of limitations. For example, criminal statutes of limitations are typically governed by the rule of lenity, which is not applicable in civil cases. *Harmon*, slip op. at 32-33. In civil cases, courts may take into consideration the purpose of an underlying remedial statute. *Id.* at 33; *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982) (continuing violations of the Fair Housing Act found in light of the "broad remedial intent of Congress embodied in the Act;" special accrual rule to the statute of limitations applied); *United States v. Aluminum Co. of America*, 824 F. Supp. 640, 645 (E.D. Tex. 1993) (purpose of the Clean Water Act considered in deciding to apply a discovery rule to the statute of limitations).[82]

In addition, one court has suggested that, in civil cases, an agency's interpretation regarding the continuing nature of requirements may receive deference in a court's determination of whether to apply the continuing violations doctrine to the statute of limitations. *See United States v. McGoff*, 831 F.2d 1071, 1084 n.22 (D.C. Cir. 1987). In contrast, the Government's construction of a criminal statute so as to provide for a continuing obligation, and hence, a continuing violation, was not accorded deference in *McGoff*.

The principal purpose of a statute of limitations is to avoid prosecution of stale claims. Passage of time between the date of a violation and the date of prosecution may serve to obscure basic facts through lost evidence and faded memories. *See Toussie*, 397 U.S. at

[82] The remedial nature of TSCA was highlighted in one of the earliest PCB enforcement cases. *In re Briggs & Stratton Corp.*, 1 E.A.D. 653, 662 (JO 1981) ("TSCA is clearly a remedial statute, not penal, and the civil penalty provisions of TSCA are simply in furtherance of the Act's remedial purposes").

114; *3M*, 17 F.3d at 1457. Concerns about staleness, however, are much less compelling when a violative course of conduct that began in the past continues unabated into the five-year period immediately preceding the filing of the complaint. In *United States v. Winnie*, 97 F.3d 975 (7th Cir. 1996), the court had no difficulty holding that the statute of limitations did not bar a suit for illegal possession of an endangered species that began fourteen years earlier but continued into the five-year period prior to the date when charges were filed. Another court noted that a "defendant who engaged in illegal storage [of hazardous waste] in 1987 cannot assert a statute of limitations defense to a 1990 prosecution, just because the storage began in 1982, outside the limitations period." *United States v. White*, 766 F. Supp. 873, 887 (E.D. Wash. 1991).[83] In this case, there is nothing stale about claims filed in 1993 based on an inspection made in 1992, despite the fact that the state of violation observed in 1992 had been continually present since 1985.

The Board recently addressed the application of the continuing violations doctrine in the statute of limitations context. *Harmon*, at 16-40. *Harmon* analyzed whether particular obligations or prohibitions under the Resource Conservation and Recovery Act ("RCRA") are continuing in nature[84] and whether those violations continued into the five-year limitations period. The *Harmon* methodology for determining whether requirements are continuing in nature looks first to the statutory language that serves as the basis for the specific violation at issue. Legislative history may be consulted in analyzing the statutory language. The implementing regulations may also contain indications of the nature of a requirement. The regulations are especially relevant where the substance of a requirement is found in the regulation rather than the statute. *See United States v. Del Percio*, 870 F.2d 1090, 1097 (6th Cir. 1989) (regulations may provide the substantive bases for determining whether a violation is continuing in nature). Words and phrases connoting continuity and descriptions of activities that are typically ongoing are indications of a continuing nature.[85] In contrast,

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[83] *Cf. United States v. Marine Shale Processors*, 81 F.3d 1329, 1357 (5th Cir. 1996) (rejecting defendant's argument that 28 U.S.C. § 2462 bars penalties for air emissions violations that occurred within the most recent five-year period simply because the pattern of illegal emissions began more than five years before the government's action was filed).

[84] *Harmon* specifically acknowledged that both continuing obligations and continuing prohibitions may give rise to a continuing violation for purposes of the statute of limitations. *Harmon*, at 39 n.41.

a continuing nature may be negated by requirements that must be fulfilled within a particular time frame.[86]

For each of the counts implicated by Lazarus' statute of limitations argument, we now consider the nature of the violations and whether the violations continued into the limitations period.

1. *Statute of Limitations As Applied to Count I (Failure to Register PCB Transformers with Fire Response Personnel)*

Count I of the Region's complaint alleged a failure to register the PCB transformers at Lazarus' department store annex with local fire response personnel. The specific requirement is:

> As of December 1, 1985, all PCB Transformers * * * must be registered with fire response personnel with primary jurisdiction (that is the fire department or fire brigade which would normally be called upon for the initial response to a fire involving the equipment).

40 C.F.R. § 761.30(a)(1)(vi). Lazarus concedes that its PCB transformers were not registered with the local fire department until February 20, 1992, approximately one week after the inspection. Lazarus Inc.'s Notice of Appeal at 5-6; Tr. at 174-75, 203. Lazarus contends, however, that the limitations period for this count expired in 1990, well before this action was commenced in 1993. Lazarus' position on this issue presumes that the registration requirement is a one-time requirement, as opposed to a continuing obligation.

The Presiding Officer held that the duty to register PCB transformers with fire response personnel was a continuing obligation, and therefore a failure to register the transformers constituted a continuing violation capable of tolling the statute of limitations. The Presiding Officer's holding was based in part on the TSCA penalty provision

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[85] In *Harmon* for example, the requirement that "[o]wners and operators of hazardous waste management units must have permits * * *" was suggestive of a continuing nature due to the use of the word "have." "The word 'have' * * * contemplates a continuing course of conduct rather than a discrete act." *Harmon*, at 24 (citations omitted).

[86] The RCRA requirements in *Harmon* that were found to be continuing in nature were distinguished from obligations in other cases that were complete upon certain dates. *Harmon*, slip op. at 42, 46, 48. *See Toussie*, 397 U.S. at 119 (obligation to register for the military draft arises at a specific time and is not continuing); *Del Percio*, 870 F.2d at 1097 (regulations that required submission of plans and schedules by a date certain were not found to be inherently continuing in nature).

which authorizes separate penalties per day of violation. "Each day a violation continues shall, for purposes of this subsection, constitute a separate violation * * *." TSCA § (16)(a)(1), 15 U.S.C. § 2615(a)(1).

TSCA section 16(a)(1) does not by itself indicate that the particular requirement at issue in Count I (*i.e.*, the duty to register PCB transformers with local fire response personnel) is continuing in nature. Rather, TSCA section 16(a)(1) is evidence that Congress contemplated the *possibility* of continuing violations of TSCA.[87] The section provides a framework for determining penalties in such situations. The penalty provision, however, does not transform every violation of TSCA into a continuing violation.

Applying the *Harmon* methodology to the transformer registration requirement, we first analyze the relevant statutory text. The transformer registration requirement is premised on TSCA's broad statutory prohibition on the use of PCBs, sometimes referred to as the "PCB ban":

> Except as provided under subparagraph (B),[88] effective one year after January 1, 1977, no person may * * * use any polychlorinated biphenyl in any manner other than in a totally enclosed manner.

TSCA § 6(e)(2)(A), 15 U.S.C. § 2605(e)(2)(A). The statutory prohibition clearly evidences an intent to institute a PCB ban beginning on the first day of 1978 and to continue the ban every day thereafter. The urgency and desire for a ban on PCBs was also expressed during the Congressional debates on TSCA section 6(e):

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[87] TSCA section 16(a)(1) is analogous to RCRA section 3008(g):

> Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

RCRA § 3008(g), 42 U.S.C. § 6928(g). In *Harmon* we found that this statutory provision "clearly assumes the possibility of continuing violations" of RCRA. *Harmon*, slip op. at 29.

[88] Subparagraph (B) permits the Administrator of EPA to authorize exceptions to the PCB ban by rule upon finding that the exceptions being authorized "will not present an unreasonable risk of injury to health or the environment." TSCA § 6(e)(2)(B); 15 U.S.C. § 2605(e)(2)(B). *See infra* discussion of section 6(e)(2)(B).

> [W]e have identified a mad dog — a known bad actor in the case of PCB. There is no doubt about its toxicity and danger in the environment. It has caused millions of dollars worth of damage in the United States; the time has arrived to get rid of it.

122 Cong. Rec. 27,186 (1976) (statement of Rep. Gude).

> The amendment before us today [TSCA § 6(e)] will force EPA to take the timely actions which are necessary. * * * [I]t will ban the use * * * of PCB's [sic] in nonenclosed uses within 1 year * * *.

122 Cong. Rec. 27,188 (1976) (statement of Rep. Downey).

The statutory prohibition provides for exceptions only as authorized by the Administrator of EPA. The Agency may authorize the use of PCBs "in a manner other than in a totally enclosed manner if the Administrator finds that such * * * use * * * will not present an unreasonable risk of injury to health or the environment." TSCA § 6(e)(2)(B), 15 U.S.C. § 2605(e)(2)(B). The rules promulgated under TSCA section 6(e)(2)(B) that pertain to PCB use are termed "use authorizations." *See, e.g.,* 44 Fed. Reg. 31,514, 31,530 (May 31, 1979); 50 Fed. Reg. 29,170, 29,174 (July 17, 1985). The overall statutory construction, combining a broad prohibition (*i.e.*, the ban) with exceptions (*i.e.*, use authorizations) that must be supported by a required statutory finding, is a strong indication that the only PCB uses permitted after January 1, 1978, are those that comply with the use authorization regulations.

The transformer registration requirement is one of several conditions of EPA's authorization of the use of PCB transformers.[89] The relationship between use authorizations and the statutory PCB ban suggests that a condition of a use authorization, such as the transformer registration requirement, is a continuing obligation. In order to authorize the use of PCBs in a non-totally enclosed manner (such as PCB transformers)[90], the Agency is required by TSCA section 6(e)(2)(B) to make

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[89] The regulatory introduction to the conditions reads: "PCBs at any concentration may be used in transformers * * * *subject to the following conditions.*" 40 C.F.R. § 761.30(a) (emphasis added). The conditions, including the transformer registration requirement, are listed under section 761.30(a)(1), which is entitled, "*Use conditions.*"

[90] EPA originally defined the use of PCBs in non-leaking transformers as "totally enclosed" and therefore not subject to the PCB ban at TSCA section 6(e)(2)(A). 44 Fed. Reg. 31,514, 31,549

Continued

a finding that use of PCB transformers does not present unreasonable risks to health or the environment. The Agency made such a finding, contingent upon certain conditions and requirements, including the transformer registration requirement:

> EPA has determined that the use of PCBs in electrical transformers does not pose unreasonable risks to public health or the environment, provided * * *:
>
> * * * * * * *
>
> c. All PCB Transformers are registered with appropriate fire response organizations * * *.

50 Fed. Reg. at 29,195 (final fire safety rule). Unless the conditions for the transformer use authorization are complied with, the use authorization is inapplicable. If a use authorization is inapplicable, the PCB ban applies.[91] The Agency reached the same conclusion in the preamble to the final fire safety rule:

> While the rule places additional restrictions and conditions on the use of PCB Transformers, it is worth noting that this regulation allows the continued uses of PCBs in electrical transformers that would otherwise be prohibited by section 6(e) of TSCA.

Id. at 29,199. Finally, because the PCB ban was clearly intended as permanent, the conditions of use authorizations must be continuing obligations in order to effectively carry out the ban.

(May 31, 1979). EPA's determination regarding the use of PCBs in transformers was challenged in *Environmental Defense Fund v. EPA*, 636 F.2d 1267 (D.C. Cir. 1980). The court found that the rulemaking record lacked substantial evidence to support EPA's "totally enclosed" determination and therefore set aside the Agency's original rule. *Id*. at 1286. On remand, EPA "decided that no electrical equipment uses [including transformers] should be categorized as use in a totally enclosed manner." 47 Fed. Reg. 37,342, 37,344 (Aug. 25, 1982). EPA then removed the "totally enclosed" determination pertaining to PCB transformer use from the PCB regulations. *See id*. at 37,357.

[91] The regulations reiterate the statute in this regard:

> Except as authorized in §761.30, the activities listed in paragraph[] (a) [*i.e.*, use of PCBs] * * * are prohibited pursuant to section 6(e)(2) of TSCA.

40 C.F.R. § 761.20.

The preambles to the regulation establishing the transformer registration requirement provide additional insight into the continuing nature of the obligation and why this particular requirement is necessary to support the Agency's finding that a use authorization for PCB transformers meets the statutory standard of TSCA section 6(e)(2)(B) (*i.e.*, the use will not present an unreasonable risk of injury to health or the environment). The registration requirement was promulgated as part of EPA's regulatory initiative to address the hazards posed by PCB transformer fires. *See* 49 Fed. Reg. 39,966 (Oct. 11, 1984) (proposed fire safety rule); 50 Fed. Reg. at 29,170 (final fire safety rule). EPA discovered that fires involving PCB transformers presented risks associated with the release of PCBs that were not adequately addressed by the Agency's previous use authorization rule for PCB transformers. 49 Fed. Reg. at 39,967. In proposing additional conditions on the transformer use authorization, the Agency made the following finding, which is the inverse of the section 6(e)(2)(B) standard:

> [C]ontinued use of PCB Transformers without additional restrictions does present an unreasonable risk of injury to health and the environment.

Id. at 39,968. EPA was concerned about the potential for serious fires involving PCB transformers that might occur during the "remaining useful life" of existing PCB transformers. *Id*.; 50 Fed. Reg. at 29,179. Such fires present an increased potential for the "formation of toxic products of incomplete combustion" and smoke and soot containing "high concentrations of volatilized PCBs and oxidation products." 50 Fed. Reg. at 29,178. EPA chose transformer registration as one of a few controls to address the risk posed by fire-related incidents:

> EPA has determined that * * * adding conditions and restrictions on the use of the remaining PCB Transformers (including * * * registration, and labeling) will significantly reduce the fire-related risks posed by the use of PCB Transformers.

Id. at 29,173. Registration of transformers with fire departments was selected for the particular purpose of minimizing the exposure of emergency response personnel to PCBs and PCB combustion products during the course of fires involving PCB transformers. "EPA expects that firefighters, aware of the nature of risks posed by a transformer fire, would be more likely to wear respiratory protection and protective clothing and would be more protective of bystanders and onlookers." *Id*. at 29,183. The registration requirement was designed to require transmission of information that actually could be utilized

by fire response personnel at the time of a fire. For example, the registration is to include information on the location of transformers and the name and telephone number of the person to contact in the event of a fire. *See* 40 C.F.R. §§ 761.30(a)(1)(vi)(A) & (C). In order to maintain the utility of the registration, it is reasonable to expect that changes in such information after the initial act of registration must be relayed to the appropriate fire response organization.

The Agency's use of phrases such as "continued use"[92] and "remaining useful life of PCB Transformers"[93] in the preambles to the transformer fire safety rule is further evidence of the continuing nature of the registration requirement. Because a fire might occur at any time during the useful life of a PCB transformer, it follows that such transformers are subject to the registration requirement on an ongoing basis.

The use of the date December 1, 1985, in the transformer registration regulation does not limit the applicability of the regulation to a particular time frame. The date is simply an effective date for the registration requirement. This is apparent from the regulatory text which requires that "as of" this date, transformers must "be registered." The regulation was promulgated some five months prior to December 1, 1985, but EPA provided facilities time to comply with the new requirement. In so doing, EPA did not alter the ongoing nature of the obligation to register transformers. The effective date does not convert the registration obligation into a one-time requirement.

Thus, we find that the requirement to register PCB transformers with fire response personnel is continuing in nature and supports a continuing violation. By failing to register the PCB transformers, Lazarus was not using its transformers in accordance with the conditions of the use authorization at 40 C.F.R. § 761.30(a). The violation began on the effective date of the regulation in 1985 and continued through February 20, 1992, the date on which the transformers were registered. Thus, the five-year limitations period only began to run on February 20, 1992, once the violation ceased. The Region's complaint, which sought a single penalty for failure to register the transformers, was filed in June 1993, only fifteen months after the last date of violation. The Region is not barred from maintaining an action for penalties as to this violation.[94]

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[92] *See, e.g.*, 49 Fed. Reg. at 39,968.

[93] *See, e.g.*, 50 Fed. Reg. at 29,179.

[94] The $6,000 penalty assessed for this count reflects a single day penalty. The Region did not seek to assess multiple day penalties despite the authority to do so pursuant to TSCA section 16(a)(1).

2. *Statute of Limitations As Applied to Count VII (Failure to Mark Door to Transformer Room with M_L Label)*

As described in the PRA discussion pertaining to Count VII, *supra* Section II.A.3., Count VII of the Region's complaint alleged a failure to mark the access door to the transformer room with the prescribed M_L warning as required by 40 C.F.R. § 761.40(j).[95] Lazarus concedes that the door to the transformer room never bore a M_L label until the day of the inspection. Lazarus Inc.'s Notice of Appeal at 6; Tr. at 176-77. Despite the admitted non-compliance, Lazarus contends that the statute of limitations for a violation of this requirement expired prior to initiation of the Region's action. Again, Lazarus' position presumes that the marking requirement is a one-time requirement rather than a continuing obligation. The Presiding Officer did not address Lazarus' statute of limitations defense with regard to Count VII although the defense was properly raised in Lazarus' answer. The merits of the defense have been argued in the briefs before us, and we will address it.

The analysis of the nature of the access door marking requirement is similar to the analysis of the transformer registration requirement discussed *supra* Section II.B.1. Means of access marking is another condition of EPA's authorization of the use of PCB transformers. Thus, like the transformer registration requirement, the means of access marking requirement is linked to the PCB ban. If the PCB ban is to be maintained as envisioned by Congress, conditions on use authorizations, such as the marking requirement here, must be continuing obligations.

We recognize, however, that it is not immediately obvious from the face of the statute or the regulatory structure that the means of access marking requirement is a condition of a use authorization. TSCA independently authorizes EPA to promulgate regulations on marking of PCBs:

> [T]he Administrator shall promulgate rules to —
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> * * * * * * *

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[95] For the convenience of the reader, the requirement is reprinted here:

> [A]s of December 1, 1985, the vault door, machinery room door, fence, hallway, or means of access, other than grates and manhole covers, to a PCB Transformer must be marked with the mark M_L * * *.

40 C.F.R. § 761.40(j)(1).

> (B) require polychlorinated biphenyls to be marked with clear and adequate warnings * * *.

TSCA § 6(e)(1), 15 U.S.C. § 2605(e)(1). Although section 6(e)(1)(B) apparently provides sufficient authority for the means of access marking requirement at issue here, section 6(e)(1)(B) was not the statutory basis that the Agency relied upon in promulgating this requirement. Rather, the Agency relied upon section 6(e)(2)(B), the authority to provide for exceptions to the PCB ban.[96] *See* 50 Fed. Reg. at 29,171.

The means of access marking regulation was promulgated with the transformer registration requirement as part of the fire safety rule for PCB transformers. The Federal Register notices on the fire safety rule indicate that means of access marking was a critical component of the overall rule and was designed to complement the transformer registration requirement. For example, in the regulatory proposal EPA stated:

> EPA believes that registration of these transformers alone, without external labeling, may not be sufficient to insure that emergency response personnel at the scene of a transformer fire are aware that a PCB Transformer is involved.

49 Fed. Reg. at 39,984. The means of access marking requirement was also part of the Agency's required statutory finding for use authorizations under TSCA section 6(e)(2)(B) as expressed in the preamble to the final rule:

> EPA has determined that the continued use of PCBs in PCB Transformers which comply with the conditions and requirements described above [including means of access marking] do not present unreasonable risks to public health or the environment.

50 Fed. Reg. at 29,173; *see also id*. at 29,195. Thus, it is apparent from the rulemaking record that the means of access marking requirement was intended to be a condition of the use authorization for PCB transformers. As such, the marking obligation has a continuing nature.

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[96] The fact that TSCA provides independent authority for marking requirements does not foreclose the possibility that a marking requirement might be nonetheless promulgated as a condition of a use authorization under section 6(e)(2)(B) rather than a requirement under section 6(e)(1)(B).

Unlike the transformer registration requirement, however, the means of access marking requirement was not codified in 40 C.F.R. § 761.30 with the other use authorizations. Instead, the means of access marking requirement appears in a subsection of 40 C.F.R. § 761.40. Section 761.40 contains other marking requirements, most of which were promulgated at an earlier date pursuant to TSCA section 6(e)(1). *See* 43 Fed. Reg. 7150 (Feb. 17, 1978) (final rule promulgating most of the marking regulations that are now codified at 40 C.F.R. § 761.40). EPA's decision to codify the means of access marking requirement with other marking requirements rather than with the use authorizations does not change our opinion of the nature of the requirement as promulgated.[97]

Not only was the means of access marking requirement promulgated as a condition of the use authorization for PCB transformers, but the purpose of the requirement also demonstrates why it must be a continuing obligation. The means of access marking requirement was selected to guard against exposure to products of PCB combustion in case of a fire involving a transformer. If the means of access to a transformer is marked, fire fighters in particular can protect themselves from exposure to the toxic byproducts of combustion. "Transformer locations must be marked with PCB identification labels. These labels must be prominently displayed and visible to emergency response personnel in the event of a fire involving the equipment." 50 Fed. Reg. at 29,196. The importance of visibility is also memorialized in a subsection of the means of access marking regulation:

> Any mark * * * must be placed in the locations described in paragraph (j)(1) of this section [*e.g.*, the door, hallway, etc.] and in a manner that can be easily read by emergency response personnel fighting a fire involving this equipment.

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[97] In other cases, our interpretation of the PCB regulations has been influenced by the organization of 40 C.F.R. Part 761. The regulations are divided into specific subparts on, *inter alia*, use, disposal, and marking. *See In re General Electric Co.,* 4 E.A.D. 884, 906 (EAB 1993) (organization of 40 C.F.R. Part 761 is an indication that use and disposal regulations are mutually exclusive concepts); *In re City of Detroit,* 3 E.A.D. 514, 523 (CJO 1991) (same). In those cases, the regulatory organization was helpful in determining that use regulations apply only to those who use PCBs and disposal regulations apply only to those who dispose of PCBs. However, the fact that there is a separate subpart on marking does not similarly suggest exclusivity. Marking requirements may well be applicable to persons who must also comply with another subpart of the regulations.

40 C.F.R. § 761.40(j)(3). The regulatory mandate for ease of identification in case of a fire is only meaningful if the mark is required to be in place continually.

The regulation further infers that the required marks are to be permanent by providing an exemption for grates and manhole covers. *See* 40 C.F.R. § 761.40(j)(1). The preamble to the final rule explains that the exemption was provided "because of difficulties in *maintaining the mark over time*" on those surfaces. 50 Fed. Reg. at 29,196 (emphasis added).

Again, as in the case of the transformer registration regulation, the reference to December 1, 1985, does not constitute a specific time frame in which compliance is necessary and after which the marking requirement becomes moot. It is simply the effective date for the means of access marking regulation. As a condition of a use authorization, a mark on the means of access to a transformer is a continuing requirement. If, for example, the mark is removed due to renovations or vandalism, but the transformer is still in use, the mark must be replaced.

Lazarus cannot invoke the statute of limitations as a license to use its PCB transformers without risk of penalty after failing to mark the door to the transformer room for a period of five years. Lazarus' failure to mark the door to the transformer room was an ongoing course of conduct that violated 40 C.F.R. § 761.40(j) beginning on the effective date of the regulation in 1985 and continuing until Lazarus placed the M_L mark on the transformer room door on the day of the inspection, February 13, 1992. At that point, Lazarus' violation was complete and the five-year statute of limitations began to run. The Region's complaint, which alleged a single violation and sought a single penalty, was filed in June 1993, less than a year and a half after Lazarus' most recent violation. Thus, this action was commenced well within the limitations period. The Region is not barred from maintaining an action for penalties as to this violation.[98]

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[98] The $13,000 penalty assessed for this count reflects a single day penalty. The Region did not seek to assess multiple day penalties despite the authority to do so pursuant to TSCA section 16(a)(1).

The $13,000 penalty assessed for the marking violation is also consistent with the Board's assessment of the seriousness of this particular violation. *In re Pacific Refining Co.*, 5 E.A.D. 520, 526-27 (EAB 1994) (failure to mark the exterior access to a PCB transformer enclosure with the M_L label is a "major" marking violation for which a $13,000 gravity-based penalty is appropriate).

3. *Statute of Limitations As Applied to Count XI (Failure to Maintain Annual Documents Regarding the Disposition of PCBs for Calendar Years 1978-1987)*

Count XI alleged violations of 40 C.F.R. § 761.180(a) due to a failure to prepare and maintain annual documents of PCB disposition for calendar years 1978-1987.[99] Lazarus conceded that it did not prepare any annual documents until after the inspection. Tr. at 168, 205. Lazarus raises a statute of limitations defense to Count XI in addition to the PRA defense discussed *supra* Section II.A.2. Because our holding on the PRA defense did not dispose of all portions of Count XI, we take up the statute of limitations issue.[100]

Neither TSCA nor its legislative history specifically discuss recordkeeping requirements such as the annual document requirement. The statutory authority giving rise to the PCB annual document requirement is TSCA's general directive for rules governing disposal of PCBs:

> [T]he Administrator shall promulgate rules to —
>
> > (A) prescribe methods for the disposal of polychlorinated biphenyls[.]

TSCA § 6(e)(1), 15 U.S.C. § 2605(e)(1).[101] The regulatory requirements promulgated under this authority are independent obligations and are not conditions on the use of PCBs. Thus, this requirement does not have the same nexus to the PCB ban as do the transformer registra-

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[99] The specific requirements of 40 C.F.R. § 761.180(a) are outlined in the PRA discussion, *supra* Section II.A.2.

[100] We held that PRA section 3512 is a defense to violations of the require- ment to prepare and maintain annual documents for calendar years 1981-1987 as alleged in Count XI and calendar year 1988 as alleged in Count X. However, violations for calendar years 1978-1980 are unaffected by the PRA defense. We address the statute of limitations issue as to those years.

Although our statute of limitations holding on Count XI only applies to allegations relating to 1978-1980, we note that all years included in Count XI are potentially subject to the statute of limitations with the exception of 1987. The alleged violation for the 1987 annual document is not subject to a statute of limitations defense because a cause of action for failure to prepare the log did not arise until after July 1, 1988. That date is within the five-year period preceding the filing of the complaint in June 1993.

[101] It is not intuitive that the annual document requirements are a compo- nent of the PCB disposal rules (as opposed to the marking rules or use authorization rules). However, the preamble to the first proposed regulation containing the annual document requirement indicates that this requirement was intended to be a part of the disposal rules. 42 Fed. Reg. 26,564, 26,570 (May 24, 1977) (recordkeeping requirements to be used to ensure timely disposal of PCBs).

tion requirement and the access door marking requirement. Overall, the statutory authority for the PCB annual document requirement does not provide a clear indication that this requirement has a continuing nature. However, because the regulation is the source of the substantive requirement, we look to it to determine if a continuing nature is apparent.

The regulatory language for the PCB annual document requirement during the years 1978-1980 provided:

> Beginning July 2, 1978, each owner or operator of a facility using or storing * * * one or more PCB Transformers * * * shall develop and maintain records on the disposition of PCBs and PCB Items. These records shall form the basis of an annual document prepared for each facility by July 1 covering the previous calendar year. * * * The records and documents shall be maintained for at least five years after the facility ceases using or storing PCBs * * *.

44 Fed. Reg. 31,514, 31,557 (May 31, 1979)[102] (originally codified at 40 C.F.R. § 761.45; current version codified at 40 C.F.R. § 761.180(a)[103]). The purpose of the annual document regulation is to assist in tracking PCB inventory and disposal at a facility. 42 Fed. Reg. 26,561, 26,570 (May 24, 1977) (preamble to proposed rule).

Much like the statutory provision, the language of the regulation and the limited discussion of its purpose in the regulatory preamble do not provide clear evidence of a continuing nature such that the statute of limitations should be extended. The obligation to prepare a PCB annual document occurs at a specific point in time (*i.e.*, every July 1). Nothing in the regulation suggests that the obligation to prepare the annual document is ongoing. The requirement for maintenance of the annual documents until after the use of PCBs ceases is more suggestive of a continuing obligation. However, in this case, the obligation to maintain documents cannot logically be separated from

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[102]The May 31, 1979 Federal Register notice repromulgated the PCB annual document regulation that was originally issued in 1978. 43 Fed. Reg. 7150, 7163 (Feb. 17, 1978). The 1979 version, quoted here, includes some minor changes in wording from the 1978 version that do not affect the analysis in this case.

[103]Currently, the regulations call for maintenance of the annual document for only three years after the facility ceases to use or store PCBs. *See* 40 C.F.R. § 761.180(a) (1996). The difference between a three-year and five-year maintenance period after cessation of PCB use is not at issue in this case.

the obligation to prepare the documents in the first instance. Preparation and maintenance of annual documents are examples of "completely dependent" acts of compliance similar to those described in EPA's PCB penalty policy. Polychlorinated Biphenyls (PCB) Penalty Policy at 13 (1990). Maintenance of the documents is impossible unless they have first been prepared. Given the dependent nature of the two prongs of the annual document regulation and the penalty policy's treatment of such requirements, the extended maintenance period does not transform the requirement into a continuing obligation. In the absence of a sufficiently clear indication of a continuing nature for the PCB annual document requirement from the statute or implementing regulation, we do not believe that it is appropriate to apply the special accrual rule provided by the doctrine of continuing violations.[104]

A separate limitations period begins to run each year that an annual document has not been prepared by July 1. An action for penalties may be initiated any time within the five-year period following each July 1. After the expiration of the statutory period, however, the Region is barred from bringing an action for penalties. The limitations period for the 1978 annual document was triggered in 1979 and it expired in 1984. The limitations periods for violations of the 1979 and 1980 annual document obligations expired in 1985 and 1986, respectively. Thus, the statute of limitations bars the Region from maintaining an action for penalties for annual document obligations for calendar years 1978-1980.[105]

4. *Summary of Decision on Statute of Limitations Issues*

We find that the five-year statute of limitations at 28 U.S.C. § 2462 does not bar the Region from recovering penalties for: 1) a failure to register PCB transformers with fire response personnel, or 2) a failure to mark the means of access to a PCB transformer with the prescribed M_L warning. Both of these requirements are continuing obligations because they are conditions of the use authorization for PCB trans-

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[104] By its terms, the statute of limitations at 28 U.S.C. § 2462 applies only to actions for fines and penalties. Had the Region sought only injunctive relief with regard to the PCB annual document requirements, it does not appear that an action would be barred. A recent court of appeals decision in an environmental case held that 28 U.S.C. § 2462 does not bar the government from bringing equitable claims for violations that occurred outside of the limitations period. *United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997).

[105] Our holding does not require any adjustment in penalty because the Presiding Officer dismissed Count XI in its entirety in the Initial Decision. The combination of our holdings on the PRA and the statute of limitations effectively upholds the dismissal of Count XI.

formers. Without the regulatory authorization, use of such transformers would be subject to the PCB ban. Accordingly, the penalty amounts assessed by the Presiding Officer for Counts I and VII are upheld.

The requirement to prepare and maintain PCB annual documents is not continuing in nature. Therefore, the Region may not collect penalties for violations of the PCB annual document requirement associated with calendar years 1978-1980. The limitations period for those violations expired prior to the filing of the complaint.

C. *Adequacy of Notice of Violations in Counts III, IV and VI Relating to Quarterly Inspections of PCB Transformers and Records of Such Inspections*

Counts III, IV and VI of the Region's complaint allege failures to perform quarterly visual inspections of the two PCB transformers at various time frames[106] and failures to maintain records of such inspections. The inspection and record maintenance requirements are use authorizations that appear in separate subsections of 40 C.F.R. § 761.30(a)(1). *See* 40 C.F.R. § 761.30(a)(1)(ix) (requiring visual inspections of PCB transformers once per quarter) and 40 C.F.R. § 761.30(a)(1)(xii) (specifying content requirements for records of transformer inspection and requiring that such records be maintained for at least three years after disposal of the transformer).

Lazarus contends that the Region's complaint did not provide Lazarus with fair notice that it would be charged with a violation of the requirement to maintain records of inspections. It apparently believes that Counts III, IV and VI only allege a failure to inspect. Lazarus Inc.'s Notice of Appeal at 9. Lazarus' argument stems in part from the citation form used in the complaint. The complaint does not cite to the two separate subsections of the regulation but uses a general citation to § 761.30(a)(1). However, the complaint alleges violations of the two subsections in sentence form as follows:

> 28. For the fourth quarter of 1991 Respondent did not perform a visual inspection of its two PCB transformers.

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[106]Count III alleges a failure to inspect and a failure to maintain records of an inspection for the fourth quarter of 1991. Count IV makes identical allegations with respect to the third quarter of 1991. Count VI alleges failures to inspect and maintain records of inspections for all quarters beginning in the third quarter of 1981 through the first quarter of 1991. The Presiding Officer held that the allegations of Count VI pertaining to 1981 through the second quarter of 1988 were barred by the statute of limitations. The statute of limitations holding was not appealed.

> 29. On February 13, 1992, Respondent did not have records of transformer inspections or maintenance history for its two PCB transformers for the fourth quarter of 1991.
>
> 30. Respondent's failure to conduct inspections of its PCB transformers and maintain records of such inspections constitutes a violation of * * * 40 C.F.R. § 761.30(a)(1) * * *.

Complaint at ¶¶ 28-30 (Count III).[107]

Lazarus objects to the pleading of Counts III, IV and VI because it has a partial defense to the allegations. Lazarus presented evidence at the hearing that it conducted visual inspections of the transformers on a monthly basis, thereby exceeding the regulatory requirement for quarterly visual inspections. However, Lazarus only prepared and maintained reports of transformer inspection and maintenance on a semi-annual basis and therefore did not satisfy the recordkeeping requirement. Thus, if Counts III, IV and VI allege only failures to inspect, Lazarus has a legitimate defense. If the counts independently allege a failure to maintain records of quarterly inspections, Lazarus cannot demonstrate compliance.

Lazarus' claim that the Region's pleading of Counts III, IV and VI was ambiguous and insufficient appears to be premised in part on the following statement from EPA's PCB penalty policy:[108]

> Some acts of compliance are completely dependent on other acts, such as keeping records of transformer inspections. Thus, the lack of inspections will normally result in the lack of records of inspection. In such cases, only one violation should be charged, namely failure to inspect.

Polychlorinated Biphenyls (PCB) Penalty Policy (1990) at 13. Lazarus thus assumes that Counts III, IV and VI only allege a failure to inspect, despite the express language in these Counts alleging a failure to maintain records. Lazarus is reading too much into the penalty policy. This portion of the penalty policy describes the enforcement discre-

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[107] Counts IV and VI contain identical allegations with regard to the other time frames at issue.

[108] Lazarus Inc.'s Notice of Appeal at 9.

tion that the Agency may exercise when there is a failure to inspect and consequently, a failure to maintain records. The penalty policy does not suggest that a failure to maintain records cannot serve as an independent basis for a violation even if inspections have taken place.[109]

We reject Lazarus' contention that the complaint did not provide fair notice that Lazarus was being charged with a failure to maintain records of transformer inspections. An unstrained reading of the counts suggests that Lazarus was charged with a violation of *both* the requirement to perform quarterly inspections *and* the requirement to maintain records of such inspections. "Respondent's failure to conduct inspections of its PCB transformers and *maintain* records of such inspections constitutes a violation * * *." Complaint ¶¶ 30, 37, 51 (emphasis added).[110] The complaint cited the regulation that contains both requirements. The complaint was not required to contain citations to the precise subsections, especially when the text clearly stated the substance of the requirements at issue. The complaint need only be "sufficiently precise to alert a respondent to the charges against it and the matters at issue." *In re Sporicidin Int'l*, 3 E.A.D. 589, 596 (CJO 1991) (citations omitted). Fair notice is achieved through pleadings that inform the respondent of the applicable legal requirement at issue, even if there are minor defects in citation. *See In re Bethenergy (Bethlehem Steel Corp.)*, 3 E.A.D. 209, 220 (CJO 1990) (notice of noncompliance that erroneously cited an unapproved version of a state SIP but otherwise correctly described the standard at issue constituted fair notice); *cf. In re Asbestos Specialists, Inc.*, 4 E.A.D. 819, 826 (EAB 1993) (complaint that cited nonexistent statutory and regulatory provisions and alleged violations of inapplicable requirements was so defective that respondent lacked fair notice).

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[109] Other administrative enforcement actions dealing with PCB transformers have held respondents liable for the failure to maintain records even though inspections had been conducted and despite the combination of inspection and recordkeeping allegations in the same count of the complaint. *In re Northville Square Assoc.*, Dkt. No. TSCA-V-C-017-92 (ALJ, Mar. 16, 1994) (respondent liable for violation of count that alleged failure to inspect and failure to maintain records where evidence showed that inspection was conducted but record was not kept); *In re West Virginia*, Dkt. No. TSCA-III-136 (ALJ, Mar. 21, 1986) (a full penalty may be assessed for violation of a count alleging both failure to inspect and failure to maintain records where evidence showed that respondent made all required inspections but lacked records of inspections).

[110] *See In re Harmon Electronics, Inc.*, 7 E.A.D. 1, 40-45 (EAB 1997) (plain reading of allegations in the complaint was sufficient to put respondent on notice that it was being charged with continuing violations); *In re Richard Rogness and Presto-X Co.*, 7 E.A.D. 235, 250 n. 18 (EAB 1997) (rejecting argument that the complaint was insufficient to apprise respondents of the charges against them).

Lazarus' evidence regarding its history of inspections was a defense only to the inspection requirement and not the independent recordkeeping requirement. Thus, the assessed penalty of $6,000 is upheld due to Lazarus' failure to maintain complete inspection records.[111]

D. *Applicability of the Presumption Against Penalties to Count XII*

Count XII of the Region's complaint alleged that the oil leak from one of Lazarus' transformers constituted a disposal of PCBs in violation of the disposal regulations at 40 C.F.R. § 761.60. The Presiding Officer found that the leak did amount to a disposal violation but reduced the proposed penalty from $5,000 to $2,500 based upon Lazarus' good faith efforts to clean up the spill. Lazarus appeals the 50% penalty reduction. Lazarus claims that its cleanup of the leak entitles it to a 100% penalty reduction pursuant to EPA's presumption against penalties for PCB spills that are cleaned up in accordance with the PCB spill cleanup policy. *See* 40 C.F.R. §§ 761.120-761.135.[112]

Lazarus does not contest the Presiding Officer's finding that the transformer leak constituted a PCB spill and was a violation of the PCB disposal regulations. Rather, Lazarus claims that the presumption against penalties requires that no penalty be assessed where a good faith effort has been made to clean up the spill in accordance with the PCB spill cleanup policy.

Lazarus' argument selectively focuses on the good faith element of the presumption against penalties and consequently misinterprets the regulation. The presumption not only requires good faith on the part of the responsible party, but also requires "compliance with procedural as well as the numerical requirements of this [the PCB spill cleanup] policy." 40 C.F.R. § 761.135(a). Lazarus failed to comply with several elements of the spill cleanup policy.

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[111]The PCB Penalty Policy suggests that $6,000 is an appropriate penalty amount for "incomplete records of PCB Transformer inspections * * *." Polychlorinated Biphenyls (PCB) Penalty Policy (1990) at 9 & 12.

[112]The presumption against penalties reads as follows:

> Although a spill of material containing 50 ppm or greater PCBs is considered improper PCB disposal, this policy establishes requirements that EPA considers to be adequate cleanup of the spilled PCBs. Cleanup in accordance with this policy means compliance with the procedural as well as the

Continued

The most obvious deficiency of Lazarus' response to the PCB leak was its delay in cleanup. Witnesses for Lazarus testified that the oily spot on the floor, which was the subject of the cleanup, "looked like it had been there a few years," and "could have been there for years." Tr. at 172, 255. Although the OEPA inspector testified that the spot on the floor could have been of more recent origin, Tr. at 73, it is clear from the hearing testimony that Lazarus was aware of the existence of the oily spot well before the inspection. Despite its awareness of the spill, Lazarus did not initiate cleanup until four days *after* the inspection. The timing of the response action in this case did not satisfy 40 C.F.R. § 761.125, which requires cleanup activities to be generally initiated within 48 hours after the responsible party becomes aware of a spill.[113] The failure to conduct a timely cleanup is reason enough to find that Lazarus is not entitled to a 100% penalty reduction under the presumption against penalties. *See In re Wichita Iron & Metals Corp.*, Dkt. No. TSCA-VII-91-T-512 (ALJ, Aug. 2, 1993) (the presumption against penalties at 40 C.F.R. § 761.135 is predicated upon compliance with the spill cleanup policy at the time of the improper disposal, not at a later date such as after an inspection).

The Presiding Officer also noted deficiencies in the conduct of the cleanup itself, including a failure to cordon off the area being cleaned up and post warning signs. *See* 40 C.F.R. § 761.125(c)(1)(ii). Lazarus argues that these requirements are not absolute and that the access restrictions used by Lazarus were equivalent to the specific requirements of the regulation. We find it unnecessary to analyze the particulars of Lazarus' cleanup procedures as we have already found that its compliance with the spill cleanup policy was incomplete based on the lack of timeliness in the cleanup.

> numerical requirements of this policy. Compliance with this policy creates a presumption against both enforcement action for penalties and the need for further cleanup under TSCA. * * * The Agency * * * reserves the right to seek penalties where the Agency believes that the responsible party has not made a good faith effort to comply with all provisions of this policy, such as prompt notification of EPA of a spill, recordkeeping, etc.

40 C.F.R. § 761.135(a).

[113] Because the spill in this case involved a PCB transformer, the spill is classified as a "high concentration spill" (≥ 500 ppm PCB) and is subject to the spill cleanup requirements at 40 C.F.R. § 761.125(c). Initial cleanup activities must be taken "as quickly as possible and within no more than * * * 48 hours for PCB Transformers after the responsible party was notified or became aware of the spill * * *. The occurrence of a spill on a weekend or overtime costs are not acceptable reasons to delay response." 40 C.F.R. § 761.125(c)(1).

The Presiding Officer was within his discretion to limit the penalty reduction to 50%. It is undisputed that the cleanup of the PCB leak failed to meet all the requirements of the spill cleanup policy. The Presiding Officer's penalty reduction for the disposal violation was generous and certainly did not amount to clear error. We affirm the penalty assessment of $2,500 for Count XII.[114]

III. *CONCLUSION*

With regard to the Region's appeal, we affirm the Presiding Officer's dismissal of Counts X and XI of the complaint. The allegations in Count XI (failure to prepare PCB annual documents for calendar years 1978-1987) are barred in part by section 3512 of the PRA and in part by the statute of limitations at 28 U.S.C. § 2462. The allegations of Count X (failure to prepare a PCB annual document for calendar year 1988) are barred by PRA section 3512.

With regard to Lazarus' appeal, we affirm the Presiding Officer's penalty assessment for Counts I (failure to register PCB transformers with local fire response personnel) and VII (failure to mark the access door to the transformer room with a M_L warning). These counts involve violations of continuing obligations that continued into the five-year period prior to the date of the Region's complaint. Therefore, the statute of limitations does not bar Counts I and VII. The Presiding Officer was within his authority to assess penalties in the amount of $6,000 and $13,000, respectively, for these violations. We also hold that Count VII is not subject to the PRA section 3512 defense. With regard to Counts III, IV, and VI, we hold that the Region's complaint provided Lazarus with fair notice that a violation of the requirement to maintain records of PCB transformer inspections was being alleged. We affirm the penalty of $6,000 for Counts III, IV, and VI. Finally, we affirm the Presiding Officer's penalty assessment of $2,500 for Count XII (improper disposal of PCBs) as Lazarus did not qualify for a 100% penalty reduction under the presumption against penalties for PCB spill cleanups.

In accordance with the foregoing analysis, the penalty assessment of $34,800 against Lazarus, Inc. is affirmed. Payment of the entire amount of the civil penalty shall be made within sixty (60) days of ser-

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[114] We note that Lazarus' response to the PCB leak was not unlike its approach to the other regulatory requirements discussed in this decision; Lazarus promptly sought to remedy its noncompliance only after the inspection identified various deficiencies. It does not appear from the record that Lazarus made any coordinated effort to address the PCB regulations, some of which date back to 1978, until after the date of the inspection.

vice of this final order. Payment shall be made by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to:

EPA—Region V
Regional Hearing Clerk
P.O. Box 360582M
Chicago, IL 60673

So ordered.