IN RE EK ASSOCIATES, L.P., D/B/A EKCO/GLACO, AND EK MANAGEMENT CORP.

CAA Appeal No. 98–4

REMAND ORDER

Decided June 22, 1999

Syllabus

This is an appeal by the Acting Director of the Air and Radiation Division, U.S. EPA, Region V ("Region") from an Initial Decision by Administrative Law Judge Carl C. Charneski ("Presiding Officer") arising out of an administrative enforcement action against EK Associates, L.P. and EK Management Corp. (collectively, "EKCO") for alleged violations of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq.* The Region alleged that EKCO committed three violations of the federally promulgated implementation plan for the control of ozone in the greater Chicago area, which is codified at 40 C.F.R. § 52.741 ("Chicago FIP").

By his Initial Decision, the Presiding Officer dismissed Count II of the Region's complaint on the grounds that the Region's pursuit of a penalty for the alleged violation was barred by the public protection provisions of the Paperwork Reduction Act ("PRA"), 44 U.S.C. § 3512. The Presiding Officer held that the Office of Management and Budget ("OMB") control number for the Chicago FIP was not adequately displayed in the Federal Register as required by regulations promulgated by OMB under the PRA. The Presiding Officer, however, also found that EKCO had committed two violations of the Chicago FIP, not subject to the PRA defense, and he assessed an aggregate penalty of $86,107 for those violations. The Region appeals both the dismissal of Count II and the Presiding Officer's penalty assessment.

The Region argues that the dismissal of Count II, which alleged a reporting violation, was improper because the EPA had sufficiently complied with the PRA's requirement that an OMB control number for the Chicago FIP be "displayed." The Region cites the publication, on June 25, 1993, of the control number together with a citation to the Chicago FIP as part of amendments to 40 C.F.R. part 9 as proof of adequate display. In appealing from the Presiding Officer's penalty assessment for Counts I and IV, the Region argues that the Presiding Officer failed to "consider" the applicable penalty policy as required by 40 C.F.R. § 22.27(b), and that the Presiding Officer failed to provide specific reasons for decreasing the penalty from the amount proposed by the Region.

Held: (1) The Presiding Officer's dismissal of Count II is reversed and this case is remanded to the Presiding Officer for further proceedings on Count II. The OMB control number for the Chicago FIP was adequately displayed in the June 25, 1993 edition of the Federal Register and in the July 1993 publication of the Code of Federal Regulations.

(2) The issue of the penalties assessed for Counts I and IV of the Complaint is remanded to the Presiding Officer for the limited purpose of having the Presiding Officer provide an explanation of his reasons for departing from the penalty proposed by the Region and make any appropriate adjustments to the penalty upon consideration of the same.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Fulton:

This is an appeal by the Acting Director of the Air and Radiation Division, U.S. EPA, Region V ("Region") from an Initial Decision by Administrative Law Judge Carl C. Charneski ("Presiding Officer") arising out of an administrative enforcement action against EK Associates, L. P. and EK Management Corp. (collectively, "EKCO") for alleged violations of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq*. The Region alleged that EKCO committed three violations of the federally promulgated implementation plan for the control of ozone in the greater Chicago area, which is codified at 40 C.F.R. § 52.741 ("Chicago FIP").

By his Initial Decision, the Presiding Officer dismissed Count II of the Region's complaint on the grounds that the Region's pursuit of a penalty for the alleged violation was barred by the public protection provisions of the Paperwork Reduction Act ("PRA"), 44 U.S.C. § 3512. The Presiding Officer, however, also found that EKCO had committed two violations of the Chicago FIP, not subject to the PRA defense, and he assessed an aggregate penalty of $86,107 for those violations. The Region appeals both the dismissal of Count II and the Presiding Officer's penalty assessment. EKCO has not filed an appeal, but it does oppose the Region's appeal.

I. *BACKGROUND*

The Clean Air Act requires, in certain circumstances, that EPA establish a federal implementation plan ("FIP") to implement, maintain and enforce the National Ambient Air Quality Standards ("NAAQS"). CAA § 110(c), 42 U.S.C. § 7410(c). The NAAQS are "maximum concentration 'ceilings'" for particular pollutants, "measured in terms of the total concentration of a pollutant in the atmosphere." *In re Hawaii Elec. Light Co.,* 8 E.A.D. 66, 72 (EAB 1998). These standards set the allowable ambient concentration of each designated pollutant at a level designed to protect public health and welfare. Ozone is one of the pollutants for which NAAQS have been established. *See* 40 C.F.R. § 50.9. The regulations

require that an implementation plan control ozone by, among other things, controlling emissions of volatile organic compounds ("VOCs").[1]

EPA is required to promulgate a federal implementation plan, or FIP, for areas in which a state either fails to submit a state implementation plan ("SIP") to the EPA for approval or submits a SIP that is not approved. Although Illinois promulgated a SIP, the United States District Court for the Eastern District of Wisconsin found in January 1989 that there were deficiencies in the Illinois SIP relating to the control of ozone and directed EPA to promulgate a FIP for ozone covering the greater Chicago area. To comply with the Court's order, the EPA promulgated the Chicago FIP on June 29, 1990. *See* Approval and Promulgation of Implementation Plans, 55 Fed. Reg. 26,814 (June 29, 1990) (codified at 40 C.F.R. § 52.741). The Chicago FIP is applicable by its terms to the Illinois counties of Cook, DuPage, Kane, Lake, McHenry and Will.

EKCO operates a facility (the "Facility") in Rockdale, Illinois, which is located in Will County. Because the Facility is located in Will County, Illinois, it is within the geographic area covered by the Chicago FIP.

At the Facility, EKCO cleans and reglazes commercial baking pans. In essence, the cleaning process employed by EKCO involves the use of various organic solvents to break up, destroy and degrade oil, grease and old glaze on baking pans; the reglazing process entails the use of additional organic solvents in the process of applying a release coating to the cleaned baking pans. Initial Decision at 5. By this process, EKCO emitted 9.34 tons of VOCs at the Facility during the period of July 1, 1992 through December 31, 1992, and another 10.18 tons of VOCs during the period of January 1, 1993 through June 30, 1993. *Id.* at 5–6.

EPA conducted inspections of the Facility in July and November of 1993. In April 1994, EPA issued to EKCO a Notice of Violation arising out of the inspections. Subsequently, in June 1995, the Region filed its complaint commencing this action (the "Complaint"). In the Complaint, the Region alleged four violations of the Chicago FIP. Specifically, the Complaint alleged in Count I that EKCO had failed to operate a cold-cleaning degreaser in accordance with 40 C.F.R. § 52.741(d)(1); in Count II that EKCO had failed to timely certify to the EPA, pursuant to 40 C.F.R. § 52.741(e)(5)(ii), compliance with certain provisions of the Chicago FIP; in Count III that EKCO had failed to maintain records as required by 40 C.F.R. § 52.741(e)(6)(ii)(B); and in Count IV that EKCO had failed to operate a

[1] The term "volatile organic compounds" is defined at 40 C.F.R. §§ 51.100(s), 52.21(b)(30).

coating line in compliance with the formulation requirements of 40 C.F.R. § 52.741(e)(1). The Complaint proposed an aggregate penalty of $181,923 for the alleged violations. Subsequently, the Region withdrew Count III of the Complaint and reduced its proposed aggregate penalty to $151,622. EKCO filed an answer to the Complaint denying liability and raising, among other things, a defense as to Count II that the Chicago FIP failed to comply with the PRA in that it allegedly failed to display an Office of Management and Budget ("OMB") control number showing that the paperwork requirements had been approved.

In the Initial Decision, the Presiding Officer found EKCO liable for the violations alleged in Counts I and IV. Initial Decision at 7–10, 12–17. As to Count II, the Presiding Officer sustained EKCO's defense based upon the public protection provisions of the PRA. *Id.* at 10–12. Specifically, the Presiding Officer found inadequate the "display" in the Federal Register of the OMB control number for the information collection request at issue in Count II. *Id.* The Presiding Officer assessed a civil penalty of $7,000 for the violation alleged in Count I and a civil penalty of $79,107 for the violation alleged in Count IV, totaling $86,107 for both violations. This appeal followed. The Region requests both that we reverse the dismissal of Count II and that we review the penalty assessed for Counts I and IV.

For the following reasons, we reverse the dismissal of Count II, finding that the PRA defense is not applicable in this case. Because the Presiding Officer did not make findings on liability as to Count II, we remand Count II for further proceedings to consider the Region's proof of its allegations and any other defenses raised by EKCO and for assessment of an appropriate penalty if a violation is found. We also remand the penalty assessment for Counts I and IV for the limited purposes described below.

II. *DISCUSSION*

A. *The PRA Defense Is Not Applicable to Count II*

The Region argues that the dismissal of Count II, which alleged a reporting violation, was improper because the EPA had sufficiently complied with the PRA's requirement that an OMB control number for the Chicago FIP be displayed. The Region argues that, although the OMB control number may not have been sufficiently displayed at the commencement of the violation, the OMB control number was sufficiently displayed during the time when the violation alleged in Count II was

continuing and that a penalty should be assessed for the violation after the date of adequate display.

1. *PRA: Statutory and Regulatory Background*

The Paperwork Reduction Act of 1980 ("1980 PRA")[2] was enacted "[t]o minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons." 1980 PRA § 3501(1).[3] In order to effectuate a reduction of federal paperwork, the 1980 PRA empowered OMB to review proposed federal agency paperwork requirements and approve (or disapprove) such requirements.[4] Although the PRA has been amended several times,[5] the central purposes of the PRA and the authority of OMB under the PRA have not been changed in any respect material to this appeal.

The PRA generally prohibits federal agencies, including EPA, from conducting or sponsoring a "collection of information" through imposition of an "information collection request" ("ICR")[6] on the public, unless the agency has previously submitted the proposed ICR to OMB for review. 1980 PRA § 3507(a), as amended (formerly codified at 44 U.S.C. § 3507(a)). Each ICR approved by OMB is to be assigned an "OMB control number," which is "to be displayed upon the [ICR]." *Id.* § 3507(f).

The OMB control number is intended to serve as a tool by which the public can verify that an ICR has been reviewed by OMB and meets PRA

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[2] 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 by 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 below. 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). The 1995 Act is inapplicable to this action as it postdates the alleged violations (spanning 1992–1994). The statutory references used throughout this opinion distinguish between the three versions of the PRA, as appropriate.

[3] 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.

[4] 1980 PRA §§ 3504(c)(1), (h), 3507(b).

[5] *See* note 2 above.

[6] As amended in 1986, "[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 * * *." 1986 PRA Amendments § 812(1) (previously codified at 44 U.S.C. § 3502(11)).

statutory criteria regarding elimination of duplicative collections, reduction of burden, and usefulness.[7] As a corollary to the affirmative duty imposed on agencies to obtain OMB review and approval of ICRs, 44 U.S.C. § 3507, Congress also enacted the so-called "public protection provision" to protect the public from ICRs that have not been submitted to OMB for review.

During the time period of the violations at issue in this case, the public protection provision provided as follows:

> 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 * * * does not *display* a current control number assigned by the Director [of OMB], or fails to state that such request is not subject to this chapter.

1980 PRA § 3512, as amended (formerly codified at 44 U.S.C. § 3512) (emphasis added). Thus, section 3512 of the PRA offers a potential defense for persons subject to enforcement actions involving federal regulatory[8] paperwork requirements. Because the public protection defense is predicated on the lack of "display" of an OMB control number, the determination of whether the PRA serves as a defense to Count II in the present case turns on an analysis of the "display" requirement and the means by which EPA displayed the OMB control number for the reporting requirements of the Chicago FIP.

The PRA does not define the term "display." OMB regulations implementing the PRA during the time period at issue, however, defined "display" in relevant part as follows:

> 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

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[7] *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.").

[8] As we have observed, courts have uniformly held that PRA § 3512 only provides a defense to violations of regulatory paperwork requirements and does not apply to paperwork requirements directly imposed by statute. *See In re Lazarus, Inc.,* 7 E.A.D. 318, 328–29 n.22 (EAB 1997) (citing cases from the 11th and 9th Circuit Courts of Appeals).

> technical amendment) and ensure that it will be included in the Code of Federal Regulations if the issuance is also included therein * * *.

5 C.F.R. § 1320.7(e)(2) (1993).

In the present case, the OMB control number had not been issued at the time EPA promulgated the Chicago FIP. EPA, however, did explain in the preamble that it had submitted the Chicago FIP to OMB for review pursuant to the PRA. 55 Fed. Reg. 26,814, 26,856 (June 29, 1990). Subsequently, on May 26, 1993, EPA published a notice in the Federal Register stating as follows:

> EPA ICR #1565.02; Federal Implementation Plan for Ozone in the Chicago Area; was approved 05/19/93; OMB #2060–0203; expires 05/31/96.

58 Fed. Reg. 30,165 (May 26, 1993). At approximately the same time, EPA began to examine "the status of [its] information collection requests (ICRs) under the PRA." Technical Amendments to OMB Approval Numbers, 58 Fed. Reg. 18,014 (Apr. 7, 1993). As a result of its examination, EPA decided to publish the OMB control numbers for all of EPA's regulatory ICRs in a centralized table in 40 C.F.R. part 9 (the "Part 9 Table") listing each control number, date of issuance, date of expiration, and identifying the regulations covered by the control number. *See* OMB Approval Numbers Under the Paperwork Reduction Act, 58 Fed. Reg. 27,472 (May 10, 1993) (promulgating part 9); OMB Approval Numbers Under the Paperwork Reduction Act, 58 Fed. Reg. 34,369 (June 25, 1993) (amending part 9). The control number for the Chicago FIP was included in the notice amending part 9, published in the Federal Register on June 25, 1993. *See* 58 Fed. Reg. 34,369. The Part 9 Table was thereafter published in the July 1993 and subsequent volumes of the C.F.R. at the conclusion of every volume of title 40 of the C.F.R.

The Region argued below that the display requirement was satisfied by the notice published in the Federal Register on May 26, 1993, and by the subsequent publication of the control number in a table of control numbers printed in each volume of the C.F.R. pursuant to 40 C.F.R. part 9.

The Presiding Officer rejected the Region's contentions regarding publication in the Federal Register and, accordingly, held that the display requirement was not satisfied in this case. Notably, because he found a deficiency in the Agency's May 26, 1993 Federal Register publication, the

Presiding Officer did not reach the question of whether the OMB control number for the Chicago FIP was adequately displayed in the C.F.R.[9]

In approaching the Federal Register question, the Presiding Officer first observed that, although the preamble to the notice of final rulemaking published in the Federal Register stated that the Chicago FIP had been submitted to the OMB for review under the PRA, the Chicago FIP, itself, "did not contain the required Information Collection Request control number." Initial Decision at 11. Citing this Board's *Lazarus* decision, the Presiding Officer then held that the May 26, 1993 publication of the OMB control number for the Chicago FIP was not adequate because "[t]his Federal Register publication simply does not inform the regulated community that the Office of Management and Budget approved the Information Collection Request that is the subject of Count II." *Id.* at 12.[10] The Presiding Officer thus held that the publication of the notice in the Federal Register on May 26, 1993, was not adequate.

2. *The Parties' Arguments on Appeal*

On appeal, the Region argues that even if the May 26, 1993 publication of the OMB control number was not adequate,[11] "'display' for the purposes of the PRA was perfected shortly thereafter." Region's Brief at 5. The Region contends that "the Federal Register notice establishing 40 C.F.R. part 9, published at 58 Fed. Reg. 34,369 on June 25, 1993, provided adequate display of the OMB control number * * *." *Id.*[12]

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[9] In particular, the Presiding Officer stated that "[e]ven assuming the publication of the OMB control number in Part 9 of Title 40 satisfies the display requirements of the Paperwork Reduction Act, the record in this case shows that EPA failed to comply with all of the then existing display requirements. Specifically, EPA failed to properly display the subject OMB control number in the Federal Register." Initial Decision at 11.

[10] In *Lazarus,* we commented on the very brief notice at issue in that case as follows: "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,* 7 E.A.D. at 348.

[11] Although the Region did not advance any argument in its initial appeal brief as to why the May 26, 1993 notice was adequate display, it does assert in its reply brief that it has not waived the issue. Sur-Reply Brief of Appellant at 1 n.1. However, as the Region has not pursued this issue with any meaningful argument or support, we decline to consider it.

[12] Part 9 of 40 C.F.R. was actually promulgated by notice published in the Federal Register on May 10, 1993. 58 Fed. Reg. 27,472 (May 10, 1993) (codified at 40 C.F.R. pt. 9). The June 25, 1993 notice referred to by the Region amended part 9 by, among other things, adding the regulatory citation to the Chicago FIP, 40 C.F.R. § 52.741, and the OMB control number corresponding to the Chicago FIP.

EKCO argues in response that the Presiding Officer's dismissal of Count II should be sustained. EKCO first argues that the June 25, 1993 Federal Register publication of part 9 was not brought to the Presiding Officer's attention by the Region and, therefore, "arguably" could be rejected as having been waived. EKCO's Brief at 3 n.3. Second, EKCO argues that the publication of the OMB control number for the Chicago FIP as part of EPA's notice of the promulgation of part 9 is not adequate "display" because, according to EKCO, the PRA requires display of the control number "upon" the ICR, and publication in a separate table is not upon the ICR. *Id.* at 4–6. Finally, EKCO makes the related argument that OMB's regulatory definition of "display" required "EPA to print the appropriate control number in the regulatory text in the Federal Register." *Id.* at 6–7. For the following reasons, we find that the Region has not waived arguments regarding the Part 9 Table and that the June 25, 1993 publication provided adequate Federal Register display of the control number for the Chicago FIP. We further find that the C.F.R. publication of the Part 9 Table likewise satisfied the PRA's display requirements.

3. *The Region's Arguments Have Not Been Waived*

In our view, the question whether the Federal Register display was satisfied by publication of the Part 9 Table in the Federal Register was fairly before the Presiding Officer. Regulations and other information appearing in the C.F.R., such as the Part 9 Table, are necessarily published first in the Federal Register before appearing in the C.F.R. 44 U.S.C. § 1510(a). Moreover, the contents of the Federal Register "shall be judicially noticed." *Id.* § 1507. Here, the Region squarely put before the Presiding Officer the fact that the control number for the Chicago FIP had been published in the C.F.R. in the form of the Part 9 Table. *See* Complainant's Reply to Respondents' Post-Hearing Brief at 12. Inherent in this proposition was the predicate proposition that part 9 had previously been published in the Federal Register. Under these circumstances, whether or not the Region specifically framed an argument around the June 25, 1993 notice, the Presiding Officer should have taken notice of that Federal Register publication and weighed its adequacy in arriving at his decision. Moreover, independent of whether the Presiding Officer should have taken notice in these circumstances that 40 C.F.R. part 9 was published in the Federal Register prior to appearing in the C.F.R., judicial notice of matters within the scope of 44 U.S.C. § 1507 "may be taken for the first time on appeal." *Seymour v. Oceanic Navigating Co.,* 453 F.2d 1185, 1192 (5th Cir. 1972). Thus, the Region is not barred on appeal from raising issues regarding the June 25, 1993 publication of the Part 9 Table in the Federal Register.

4. *The Part 9 Table Is Adequate Display in the Federal Register*

Next, we consider whether the Part 9 Table as published in the Federal Register on June 25, 1993, is adequate display of the OMB control number for the Chicago FIP.

As noted above, the PRA provides that "no person shall be subject to any penalty * * * if the information collection request * * * does not *display* a current control number." 44 U.S.C. § 3512 (emphasis added). Although not defined by the statute, OMB regulations defined display, at the time of the violations at issue in this case, as requiring publication of the control number "in the Federal Register (as part of the regulatory text or as a technical amendment)." 5 C.F.R. § 1320.7(e)(2).

In our prior decisions, we have held that Federal Register display of the control number is adequate where (1) the control number is published "in the regulatory text in both the Federal Register and the C.F.R.," *In re Zaclon, Inc.,* 7 E.A.D. 482, 496 (EAB 1998), and (2) the control number is published in the Federal Register as part of a notice following the regulatory text. *In re Lazarus, Inc.,* 7 E.A.D. 318, 358–59 (EAB 1997). We have also held that display is not adequate where a short notice is published in the Federal Register without citation to, or description of, the regulation(s) involved. *Lazarus,* 7 E.A.D. at 348, 359.

In the present case, the Federal Register publication of the OMB control number for the Chicago FIP in the Part 9 Table on June 25, 1993, is different from the circumstances of both *Lazarus* and *Zaclon*. It differs from *Zaclon* because, here, the OMB control number was not published in the Federal Register as part of the regulatory text. It differs from *Lazarus* in that the control number was not published in a notice at the end of the regulatory text. Rather, the notice at issue here was published separately. On the other hand, the display itself contained more identifying details than the displays found to be inadequate in *Lazarus,* including a citation clearly identifying the regulation involved. In particular, the Part 9 Table, as published in the June 25, 1993 Federal Register, "lists the section numbers or parts [of C.F.R. Title 40] with reporting and recordkeeping requirements, and their current OMB control numbers." 58 Fed. Reg. 34,369 (June 25, 1993). Thus, our prior decisions have not addressed circumstances identical to the display at issue in this case.

Nevertheless, those decisions provide considerable guidance for the resolution of this case. The following principles drawn from our prior decisions, as well as OMB's regulations and the statutory text, inform our analysis. At a minimum, "the regulatory definition of 'display' contemplates

publication in the Federal Register." *Lazarus,* 7 E.A.D. at 346. Although publication of the control number as part of the regulatory text is adequate, *see Zaclon,* 7 E.A.D. at 496, it is not necessary that the control number be published as part of the regulatory text. *Lazarus*, 7 E.A.D. at 359 (the "first adequate display" was a notice in the Federal Register that followed the regulatory text).[13] The OMB regulations in effect at the time of the violations recognized that publication in the Federal Register separate from the regulatory text can be adequate display in appropriate circumstances. 5 C.F.R. § 1320.7(e)(2) (1993) (stating that display in the Federal Register may be accomplished by publication as a "technical" amendment).[14] Further, to be adequate, the publication must serve the central purpose of the display requirement: "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." *Lazarus,* 7 E.A.D. at 358. Finally, publication of a control number without identification of the regulation, either by citation or description, does not fulfill this purpose. *Id.* at 344.

Reviewing EPA's publication on June 25, 1993, of the control number for the Chicago FIP in the Part 9 Table in light of the principles discussed above, we conclude that the display in the Federal Register in this case was adequate. The June 25, 1993 notice stated as follows: "EPA is today publishing, as an addition to a single table, the current information collection request (ICR) control numbers issued by OMB for various regulations promulgated under the Clean Air Act * * *." 58 Fed. Reg. 34,369. It also stated that OMB control number 2060–0203 had been specifically assigned to the regulation codified at 40 C.F.R. § 52.741, which is the codification of the Chicago FIP. 58 Fed. Reg. at 34,370. In addition, EPA had earlier published a notice on May 10, 1993, in which EPA stated that it "is adding a new Part to consolidate the display of Office of Management and Budget (OMB) control numbers issued under the Paperwork Reduction Act (PRA) for various EPA regulations." 58 Fed. Reg. 27,472 (May 10, 1993).

This notice of EPA's plan for displaying OMB control numbers, along with the subsequent publication on June 25, 1993, of the control number for the Chicago FIP together with the citation to the regulatory section at

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[13] *See also* EKCO's Brief at 7 (noting that *Lazarus* held that a display following the regulatory text is adequate).

[14] No definition of "technical amendment" is provided by OMB's regulations. We have noted that generally such amendments are "non-substantive changes to a regulation, such as a renumbering or reorganization of C.F.R. sections, making conforming changes for purposes of consistency with other regulations, etc." *Lazarus,* 7 E.A.D. at 346 n.50.

which the Chicago FIP is codified, satisfies the requirements of both the PRA and OMB's regulations as to display in the Federal Register. The June 25, 1993 notice was in the nature of a technical amendment. *See* 58 Fed. Reg. 34,369 ("due to the technical nature of the table, further notice and comment would be unnecessary."). Further, it satisfies the PRA's policy aim. As of June 25, 1993, the public, including EKCO, would have been able to verify that the information collection request set forth in the Chicago FIP had been reviewed by OMB and was determined by OMB to satisfy the criteria of the PRA. *See Lazarus,* 7 E.A.D. at 328. On or after that date, any person searching in the Federal Register for a technical amendment displaying a control number for the Chicago FIP would have found the Part 9 Table and, concomitantly, the control number for the Chicago FIP.

We note that display in the form of the Part 9 Table is consistent with the practice of other administrative agencies. For example, beginning in 1985, the Department of the Treasury has used tables to display the OMB control numbers assigned to the Internal Revenue Service for regulatory ICRs under the tax code. *See* 50 Fed. Reg. 10,221 (Mar. 14, 1985) (codified at 26 C.F.R. pts. 601, 602). The U.S. Tax Court has held that this tabular method of display is adequate under OMB's regulations. *See Aldrich v. Commissioner,* 66 T.C.M. (CCH) 13 (U.S. Tax Court, July 6, 1993) ("Publication of the OMB control numbers in the Federal Register and in sections 601.9000(a) and 602.101, Statement of Procedural Rules, satisfies the technical amendment requirement."). Similarly, the Department of Transportation has had a longstanding practice of publishing OMB control numbers in tabular form. *See,* e.g., 48 Fed. Reg. 51,310 (Nov. 8, 1983) (codified at 49 C.F.R. pt. 509). The longstanding practice of these agencies in using tabular presentation of OMB control numbers to satisfy the display requirement of the PRA, coupled with OMB's ratification of that procedure (as discussed *infra* part II.A.5), supports our conclusion that Federal Register display was satisfied here. *See FDIC v. Philadelphia Gear Corp.,* 476 U.S. 426 (1986) (holding that FDIC's interpretation of the relevant statute, although not reduced to a specific regulation, is entitled to deference due to its longstanding practice).

5. *EKCO's Arguments Do Not Show That Tabular Publication Is Prohibited*

In its appellate brief, EKCO argues that the June 25, 1993 publication of the Part 9 Table does not qualify as display within both the statutory requirements and OMB's regulations. With respect to its statutory arguments, EKCO states as follows:

> The PRA required display of OMB control numbers "upon" an information collection request: "An Agency shall not engage in a collection of information without obtaining from the Director [of OMB] a control number to be displayed *upon the information collection request.*"

EKCO's Brief at 4 (quoting 1980 PRA § 3507(f), as amended, formerly codified at 44 U.S.C. § 3507(f)) (emphasis added by EKCO). EKCO argues that display in the table format of part 9 is not display "upon" the ICR. *Id.* at 4–6. It thus argues that pursuant to the statutory language the control number must be published in the Federal Register as part of the regulatory text to satisfy the requirement of display "upon" the ICR. We disagree.

Whatever superficial appeal EKCO's argument regarding the significance of the word "upon" may have, we cannot ignore the weight of authority and agency practice, which together compel the contrary conclusion that the statutory language does not require the control number to be published as part of the regulatory text in the Federal Register. OMB's regulatory definition of display applicable at the time of the violations in this case specifically authorized publication in the Federal Register in the form of a technical amendment. 5 C.F.R. § 1320.7(e)(2) (1993). In addition, as noted above, both the Treasury Department and the Department of Transportation have used tables for display of OMB control numbers since 1985 and 1983, respectively. 50 Fed. Reg. 10,221 (Mar. 14, 1985) (codified at 26 C.F.R. pts. 601, 602); 48 Fed. Reg. 51,310 (Nov. 8, 1983) (codified at 49 C.F.R. pt. 509). Moreover, as recognized by EKCO,[15] OMB adopted, in 1995, a regulatory definition of display that specifically recognizes publication of OMB control numbers in tables as satisfying the statutory display requirement. 60 Fed. Reg. 44,978 (Aug. 29, 1995) (codified at 5 C.F.R. § 1320.5(f)(3) (1996)). Although the 1995 amendments to OMB's regulations are not applicable to the time period at issue in this case, the subsequent promulgation of those regulations does show that the *statutory text*[16] is broad enough to encompass display of the control numbers for many ICRs in a single, easy to locate table. Thus, we conclude that the statutory language identified by EKCO does

[15] *See* EKCO's Brief at 10–11.

[16] Although the statute was significantly amended in 1995, the statutory text still contains the phrase "to be displayed *upon* the [ICR]," Pub. L. No. 104–13, § 3507(a)(3), 109 Stat. 163 (codified at 44 U.S.C. § 3507(a)(3)) (emphasis added), which is relied upon by EKCO as allegedly requiring publication of the control number as part of the regulatory text.

not limit the manner of display to publication as part of the regulatory text.[17]

EKCO also argues that OMB's regulatory definition of "display" required "EPA to print the appropriate control number in the regulatory text in the Federal Register." EKCO's Brief at 6–7. However, as noted above, the regulatory definition applicable to this case does not state that publication as part of the regulatory text is the only acceptable means of display in the Federal Register. Instead, it expressly recognizes that display may also be accomplished by a "technical amendment." 5 C.F.R. § 1320.7(e)(2) (1993). EKCO, however, argues that the reference to technical amendment only permits "EPA or any other Agency to promulgate a regulation in the Federal Register, and then to publish a later notice in the Federal Register to insert the appropriate control number into the text of the regulation in the Code of Federal Regulations." EKCO's Brief at 7 n.6. We disagree. Framing the issue as it has, EKCO is essentially arguing that, separate and apart from the question of adequacy of the Federal Register notices in this case, the display in the July 1993 C.F.R. was, itself, deficient in that the control number was not incorporated into the text of the underlying regulation. As discussed below, we disagree.

6. *Display of the Control Number for the Chicago FIP in the C.F.R. Was Adequate*

The OMB regulatory definition of "display" applicable to this case not only states that the control number must be published in the Federal Register, it also states that the Agency shall "ensure that [the control number] will be included in the Code of Federal Regulations if the issuance is also included therein." 5 C.F.R. § 1320.7(e)(2) (1993).[18] In the present case, the Presiding Officer did not discuss whether the OMB control number for the Chicago FIP was adequately displayed in the C.F.R. because

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[17] The Region has also argued that "the word 'upon' means 'on,' and 'on' means, among other things, 'in close proximity with." Sur-Reply Brief of Appellant at 2–3 (citing Webster's Ninth New Collegiate Dictionary (1990)). This definition, while not controlling, does suggest that the word "upon" as used in the statute may be more elastic than the narrow interpretation offered by EKCO.

[18] At the time, the definition of "display" provided in relevant part as follows:

> 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) and ensure that it will be included in the Code of Federal Regulations if the issuance is also included therein * * *.

5 C.F.R. § 1320.7(e)(2) (1993).

he held that display in the Federal Register was not adequate. Having found that the display in the Federal Register was adequate, we now consider whether EPA satisfied the obligation to "ensure" that the control number will be included in the C.F.R.

EKCO argues that the obligation to "ensure" publication in the C.F.R. requires that the control number be printed in the regulatory text in the C.F.R. and that publication in a table is not adequate. EKCO's Brief at 8–11. However, we find nothing in the text of the OMB regulation at issue that compels the conclusion that to satisfy the PRA, technical amendments published in the Federal Register must be converted to regulation text when published in the C.F.R. Indeed, the OMB regulation merely contemplated that the control number be "included" in the C.F.R. 5 C.F.R. § 1320.7(e)(2) (1993). The question thus becomes whether the manner in which a control number is published in the C.F.R. comports with the policy objectives underlying the display requirement: providing "a meaningful means of assessing an agency's compliance with the PRA." *Lazarus,* 7 E.A.D. at 358.

Here, EPA did in fact ensure that the control number for the Chicago FIP was published in the C.F.R. The control number, together with a clear citation to the regulatory codification of the Chicago FIP, was published in the Part 9 Table, which was printed in every volume of Title 40 of the C.F.R., including the volume containing the codification of the Chicago FIP at section 52.741. In addition, the 1993 printing of the C.F.R. also contained a notice printed immediately following the regulatory text of the Chicago FIP, advising the reader that the OMB control number had been removed pursuant to EPA's June 25, 1993 notice in the Federal Register. 40 C.F.R. § 52.741 note (1993). This was adequate to enable anyone searching the C.F.R. to locate the OMB control number for the Chicago FIP.

For the foregoing reasons, we find that the display of the OMB control number in the C.F.R. during the time period at issue in this case was adequate. Therefore, EKCO has failed to establish its defense based on the public protection provisions of the PRA. Accordingly, we hereby reverse the dismissal of Count II of the Complaint and remand Count II for further proceedings. Because the Presiding Officer made no explicit findings as to whether the violation alleged in Count II of the Complaint actually occurred, and because this issue was contested before the Presiding Officer, this matter is remanded to the Presiding Officer to determine whether the alleged violation actually occurred and, if so, to consider the appropriate penalty for such violation.

B. *Penalty Issues: Counts I and IV*

Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1), authorizes the Administrator to assess civil administrative penalties for violations of the CAA or its implementing regulations. The statute also specifies general criteria that must be considered by the Agency in assessing a civil penalty. Those criteria in relevant part are as follows:

> In determining the amount of any penalty to be assessed under this section * * *, the Administrator * * * shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence * * *, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

CAA § 113(e), 42 U.S.C. § 7413(e). In addition, pursuant to 40 C.F.R. § 22.27(b), the presiding officer must "consider" any civil penalty guidelines or policies issued by the Agency. Moreover, "[i]f the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. 40 C.F.R. § 22.27(b).

We have generally held that, while the presiding officer must consider the Agency's penalty policy, in any particular instance the presiding officer may depart from the penalty policy as long as the reasons for the departure are adequately explained. *See In re DIC Americas, Inc.,* 6 E.A.D. 184, 190 n.10 (EAB 1995); *In re Pacific Refining Co.,* 5 E.A.D. 607, 612 (EAB 1994); *In re A.Y. McDonald Indus., Inc.,* 2 E.A.D. 402, 414 (CJO 1987); *see also In re Great Lakes Div. of Nat'l Steel Corp.,* 5 E.A.D. 355, 374 (EAB 1994) (penalty policies facilitate the application of statutory penalty criteria; policies serve as guidelines that need not be rigidly followed); *In re ALM Corp.,* 3 E.A.D. 688 (CJO 1991). We have also approved deviation from the penalty policies on numerous occasions. *See,* e.g.*, In re Ray Birnbaum Scrap Yard,* 5 E.A.D. 120 (EAB 1994) (affirming ALJ's deviation from penalty policy's formula for calculating "ability to pay" because application of policy's formula resulted in an unduly harsh penalty); *In re Mobil Oil Corp.,* 5 E.A.D. 490 (EAB 1994) (deviating from EPCRA penalty policy with respect to policy's "gravity"

level because policy would have resulted in an overestimation of the potential threat of the release).

In the present case, the Region requested a total penalty of $151,622 for all three alleged violations. Transcript, volume 1 ("Tr. V1") at 172. Although the proposed penalty was stated as an aggregate penalty for all three violations, the Region provided a detailed statement of how, applying the applicable penalty policy, it arrived at the aggregate number. *See* Complainant's Exhibit ("C Ex") 8. The Presiding Officer assessed a total penalty for Counts I and IV of only $86,107, with $7,000 allocated to Count I and $79,107 allocated to Count IV. The Presiding Officer stated that he considered the applicable EPA penalty policy. Initial Decision at 18 n.15. However, he explained his penalty rationale "in the context of the statutory penalty criteria," without discussing the penalty policy's guidance. *Id.* at 18. The Presiding Officer did not explain how his penalty was the same as, or was different from the penalty proposed by the Region, and he did not identify which components of the Region's analysis he adopted and which ones he rejected.

In appealing from the Presiding Officer's penalty assessment for Counts I and IV, the Region first argues that the Presiding Officer failed to "consider" the applicable penalty policy as required by 40 C.F.R. § 22.27(b). Region's Brief at 9–10. Second, the Region argues that the Presiding Officer failed to provide specific reasons for decreasing the penalty assessed from the amount proposed by the Region. *Id.* at 10–14.

EKCO opposes the Region's appeal from the penalty assessment, arguing that "the reduction in penalty was well-supported in the record and that the ALJ's rationale and explanation were more than adequate." EKCO's Brief at 11. EKCO's brief, however, belies its own promise that "[a]s explained below, both changes [in the amount of the penalty] were * * * sufficiently explained in the Initial Decision." *Id.* at 12. In the five and one half pages on this issue in EKCO's brief, which contains 28 citations to the hearing transcript and exhibits, EKCO cites the Presiding Officer's explanation of his penalty rationale only once. Thus, although EKCO has provided its own explanation of the penalty, offering extensive citations to the record in support, it has done little to show that the *Presiding Officer's* reason for departing from the policy-based penalty sought in the Complaint was adequately explained.

We have observed that we should not have to "engage in conjecture * * * in order to discern a Presiding Officer's reasons for deviating from a recommended penalty." *In re Pacific Refining Co.,* 5 E.A.D. 607, 613 n.7 (EAB 1994); *see also In re Gordon Redd Lumber Co.,* 5 E.A.D. 301, 331–32

(EAB 1994). Although the Presiding Officer's analysis in this case is certainly more extensive than the explanation at issue in *Pacific Refining*, it is devoid of any meaningful explanation why the penalty numbers derived by the Presiding Officer differ from those proposed by the Region. We think that 40 C.F.R. § 22.27(b) contemplates something more. Thus, we remand the penalty assessed for Counts I and IV of the Complaint for the limited purpose of having the Presiding Officer provide an explanation of his reasons for departing from the penalty proposed by the Region and make any appropriate adjustments to the penalty upon consideration of the same.[19] The Presiding Officer shall then issue a decision, appealable to this Board pursuant to 40 C.F.R. § 22.30, setting forth the amount of the penalty to be assessed against EKCO.

III. *CONCLUSION*

For the foregoing reasons, we hereby remand this case to the Presiding Officer for further proceedings to determine whether the violation alleged in Count II of the Complaint actually occurred and, if liabil-ity is found, to consider the appropriate penalty for such violation. On remand, the Presiding Officer also shall provide a more extensive explanation of the penalty rationale for Counts I and IV consistent with our discussion above.

So ordered.

[19]Our remand of these issues should not be taken as an indication that we necessarily disagree with the amount of the penalty. Rather, we simply find an element missing from the Presiding Officer's analysis.