UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Zaclon Incorporated,	)	Docket No. RCRA-V-W-92-R-9
	)	
	)	
Respondent	)	

Resource, Conservation, and Recovery Act--Paperwork Reduction Act--OMB Control Number---Display

Where OMB control number was displayed in preamble to regulation (40 CFR § 270.1(c)), which was designed to implement section 3005(i) of the Hazardous and Solid Waste Act Amendments of 1984 (42 U.S.C. § 6925(i)), and which required the collection of information within the meaning of the Paperwork Reduction Act (44 USCS §§ 3501 et seq.), but was not displayed in the regulation, a penalty could not be exacted for Respondent's failure to timely comply with a letter from EPA, which requested the submission of either a Part B post-closure permit application or an equivalency demonstration, and which did not display an OMB control number.

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INITIAL DECISION

The complaint, findings of violation and compliance order in this proceeding under section 3008(a) of the Solid Waste Disposal Act, as amended, commonly referred to as RCRA (42 U.S.C. § 6928(a)), filed on December 24, 1991, charged Respondent, Zaclon Incorporated (Zaclon), with failure to submit a Part B post-closure permit application or an equivalency demonstration as required by 40 CFR § 270.1(c). For this alleged violation, it was proposed to assess Zaclon a penalty totaling $81,100.

Zaclon answered, admitting that it had not submitted a post-closure Part B application or an equivalency demonstration, but denying any obligation to do so, alleging that the proposed penalty was excessive and requested a hearing.

After the parties submitted pre-hearing information in accordance with an order of the ALJ, Zaclon filed a motion for accelerated decision on September 4, 1992, arguing that the post-closure requirements applicable to hazardous waste TSD facilities were not applicable to it and that the complaint should be dismissed. On September 17, 1992, Complainant filed a motion in opposition to Zaclon's motion and a cross-motion for accelerated decision. By an order, dated October 6, 1993, which is incorporated herein by reference, Zaclon's motion was denied and Complainant's motion for an accelerated decision as to liability was granted. On October 18, 1994, Complainant filed a motion to reduce the amount of the penalty claimed to $37,600. This motion was granted by an order, dated October 28, 1994. A hearing on this

matter, limited to penalty issues, was held in Chicago, Illinois, on November 9, 1994.

Based upon the entire record, including the briefs and the proposed findings and conclusions of the parties,[1/] I make the following:

FINDINGS OF FACT

1. Zaclon Incorporated is a corporation incorporated under the laws of the State of Ohio. Zaclon owns and operates a facility located at 2981 Independence Road, Cleveland, Ohio. Although Zaclon is a large quantity generator [of hazardous waste], it does not have nor is it required to have any RCRA permits [because all hazardous waste is disposed of off-site] (Krimmel, Tr. 121-22).

2. Prior to 1980 and continuing through June 11, 1987, the facility referred to in finding 1 was owned and operated by E.I. DuPont de Nemours & Company (DuPont) as a chemical manufacturing plant.[2/] Chemicals manufactured at the plant included zinc chloride and zinc ammonium chloride. In 1980, as required by RCRA, DuPont submitted a notification of

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[1/] Proposed findings not adopted are either rejected or are considered to be unnecessary to the decision. Because it is concluded that the Paperwork Reduction Act bars the assessment of a penalty herein, no findings as to the calculation of the proposed penalty are made.

[2/] DuPont had operated a plant at the site for over 120 years.

hazardous waste activity and a Part A permit application (CX-1, CX-2). The facility thereby qualified for "interim status" in accordance with RCRA § 3005(e).

3. Operations covered by interim status authority included a waste pile for the treatment of hazardous waste generated during production of the chemicals referred to in finding 2. Treatment consisted of mixing the muds from the zinc chloride filters and wastewater treatment sludges with lime on a diked concrete pad so as to render the waste nonhazardous (Part A Permit Application, dated November 3, 1980, CX-2). By letters, dated October 23, and October 31, 1986, DuPont's closure plan, dated May 10, 1985, for the waste pile was approved by the Ohio EPA (OEPA) and the U.S. EPA, respectively (Equivalency Demonstration, Appendix F, R's Exh. B). Thereafter, DuPont closed the waste pile by removing all waste material and decontaminating the waste pad and containment structure. DuPont certified that closure was in accordance with the closure plan on December 5, 1986 (R's Exh. B, Appendix D).

4. By a letter, dated March 5, 1987, DuPont was informed by the OEPA that "all necessary activities concerning closure and withdrawal of your Ohio Waste Installation & Operation Permit had been properly completed by your facility" (R's Exh. B, Appendix G). The letter further stated that "you have gone through formal closure and will maintain the status of a generator only with less than 90-day storage". By an undated

letter, apparently received by DuPont on April 15, 1987, DuPont was informed by U.S.EPA that "(w)e have completed review of your letter of April 3, 1987, with the attached certification for closure from the State Agency, and we are satisfied that the facility was properly closed in accordance with the approved closure plan" (R's Exh. B, Appendix G). DuPont was reminded, however, that its facility still had "interim status" for the units that underwent closure and consequently, was subject to corrective action requirements as specified in the Hazardous and Solid Waste Amendments of 1984.

5. Zaclon purchased the facility identified in the preceding findings on June 12, 1987. Excerpts from the agreement by which Zaclon purchased the property are in evidence (R's Exh. A). A section of the agreement entitled "Environmental Compliance" provides in pertinent part:

Closure of RCRA Facility

> The Cleveland Plant has an asphalt/concrete pad which had been used for mixing lime with zinc process sludge to render the sludge non-hazardous under RCRA. That usage was terminated in 1986. Our closure plan was approved by Ohio and U.S. EPA offices. Cleanup under that plan was completed to the satisfaction of Ohio EPA (the lead agency) which provided us a letter so stating. The U.S. EPA has agreed to sign off pending its final site inspection.

6. By a letter, dated July 8, 1988, U.S. EPA enclosed a copy of a report of an RFA/VSI of the Zaclon facility, conducted on June 15, 1988, and informed DuPont that "at the present time the Agency believes that any further action with respect to RCRA corrective action is not warranted" (R's Exh. B, Appendix

H). With respect to the former hazardous waste management unit (HMU) at issue here, the report states that this unit was formerly the location of a hazardous waste pile which was ordered closed in accordance with a CAFO signed by U.S. EPA and E.I. DuPont in 1986. In accordance with the closure plan, the waste was removed and the area was decontaminated to background levels which were determined to be clean. The report states that the area currently serves as an exit port for non-hazardous sludges which result from operation of the wastewater treatment system.

7. By a letter, dated September 20, 1990, the U.S. EPA invited Zaclon's attention to the Hazardous and Solid Waste Amendments of 1984 and pointed out that, according to "our" records, your facility closed a hazardous waste pile following a closure plan approved by U.S. EPA on October 30, (actually October 31), 1986 (CX-12). The closure was in accordance with Part 265 Interim Status requirements. A certification, indicating that closure was accomplished in accordance with the closure plan, was received by EPA on December 5, 1986. The letter pointed out that section 3005(i) [added to RCRA by HSWA] required land disposal units, including waste piles, which received hazardous waste after July 26, 1982, to comply with, inter alia, groundwater monitoring and corrective action requirements applicable to new units. The letter stated: "The U.S. EPA implemented this provision in the December 1, 1987, Codification Rule (enclosed)". The mentioned Agency

regulation specified that land treatment units, which received wastes after July 26, 1982, or that certified closure (according to § 265.115(c)) after January 26, 1983, must have post-closure permits, unless they demonstrate closure by removal as provided in § 270.1(c)(5) and (6).[3/] The letter provided that it constituted a formal request that Zaclon submit a post-closure permit application or, if it believed that Part 264 standards for closure by removal were met, it could petition for an equivalency determination. The post-closure permit application or an equivalency demonstration was to be submitted within six months of receipt of the letter.

8. Although the September 20 letter referred to in finding 7 was certified, the return receipt is not dated (CX-Exh. 12) and it is not clear precisely when Zaclon received the letter. Mr. James B. Krimmel, president and one of two owners of Zaclon, testified that he was not aware of the letter until the notice of violation [complaint] was received in January 1992 (Tr. 123). He testified that the September 20 letter was eventually located in a RCRA file in the environmental manager's office and that the person who was the

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[3/] 40 CFR § 270.1(c), effective December 31, 1987 (52 Fed. Reg. 45788, December 1, 1987). The Agency's September 20 letter erroneously stated that changes to the Part 265 regulations to bring waste piles into conformance with Part 264 requirements were issued on March 19, 1987 (52 Fed. Reg. 8704, March 19, 1987). In fact, the rule, effective September 15, 1987, expressly applied only to surface impoundments.

environmental manager [at the time the letter was received] had been terminated.[4/] Zaclon did not comply with the request in the letter and the complaint initiating this proceeding was issued in December 1991. Zaclon submitted an equivalency demonstration by letter, dated June 2, 1992, which was approved by EPA on September 25, 1992 (R's Exhs. B & C).

9. In its motion for an accelerated decision dismissing the complaint, Zaclon argued that inasmuch as the HMU (waste pile) had been clean-closed to the satisfaction of both OEPA and EPA almost a year before Zaclon purchased the property, Zaclon was not an "owner or operator" of an HMU and accordingly, 40 CFR § 270.1(c) was not applicable. Zaclon asserted that any residual RCRA obligations remained with DuPont as the owner at the time of closure. The order, dated October 6, 1993, held, however, that the residual obligation to either obtain a post-closure permit or demonstrate that closure by removal met the requirements of Part 264 accompanied ownership of the property, thus making Zaclon an "owner" as defined in 40 CFR § 270.2 and as used in 40 CFR § 270.1(c).

10. By a letter, dated November 2, 1994, Zaclon filed a supplemental pre-hearing exchange, which enclosed a copy of OMB regulations (5 CFR Part 1320) implementing the Paperwork

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[4/] A narrative explanation accompanying the initial penalty computation worksheet (CX-3) states that Zaclon's environmental manager placed the letter in his file without taking any action, because he believed that answering the request was DuPont's responsibility. No source for this statement was identified.

Reduction Act (PRA), 44 USCS § 3501 et seq., and, inter alia, alleged by implication that, because EPA's September 20 letter, requesting submittal of a Part B post-closure application or alternatively, an equivalency demonstration, did not display an OMB control number or state that it was not subject to the PRA, no penalty could be assessed. On November 7, 1994, Complainant filed a motion in limine to exclude any evidence relating to the PRA upon the ground that the PRA was an affirmative defense which had been waived, because it was not raised in the answer or subsequent pleadings. Zaclon argued that the PRA defense was encompassed within the second defense in its answer, i.e., the September 20 letter was not a lawfully issued order enforceable against it and/or the 10th defense, the complaint failed in whole or in part to state a claim [upon which relief could be granted].

11. The ALJ ruled that evidence relating to the PRA would be received subject to Complainant's motion and that, if [this ruling] required the taking of additional evidence, the matter would be addressed at a later date. Mr. Harry D. Campbell, an environmental protection specialist and one of two EPA witnesses who testified as to the calculation of the proposed penalty, testified on cross-examination that the September 20 letter did not have [display] OMB control numbers (Tr. 79, 80). This testimony is supported by the copy of the letter in

the record (CX-12), which additionally contains no statement or indication that the request was not subject to the PRA.

12. Attached to Complainant's post-hearing reply brief is an affidavit of Stephen M. Bouchard, dated February 15, 1995, who states, inter alia, that he is a permit writer in the RCRA permitting branch, Waste Management Division, U.S. EPA Region V, that his duties include review of post-closure permit applications, that after December 31, 1987, the effective date of 40 CFR § 270.1(c), EPA began investigating the post-closure compliance of facilities which had previously closed interim status units and that, as part of that investigation, letters were sent to facilities, including Zaclon, requesting the submission of either a post-closure permit application or an equivalency demonstration. The September 20 request letter to Zaclon identified Mr. Bouchard as the EPA contact and he stated that a copy of the letter was included in the case file which had been opened regarding Zaclon.

CONCLUSIONS

1. Complainant's contention that the Paperwork Reduction Act (PRA), 44 USCS §§ 3501 et seq., is not relevant, because it is an affirmative defense which Zaclon has waived, is rejected. Complainant's motion to exclude and/or strike evidence and arguments relating to the PRA will be denied.

2. Although an OMB control number was contained in the preamble (52 Fed. Reg. 45788-799 at 45797, December 1, 1987) to the

regulation at issue here (40 CFR § 270.1(c)), this does not constitute "display" of the control number as required by the PRA (44 USCS § 3512) as a condition to exacting a penalty for failing to comply with an information collection request. "Display" is defined as including the OMB control number as "part of the regulatory text" in the regulation (5 CFR § 1320.7(e)), and, inasmuch as the September 20 request letter also did not contain an OMB control number or state that it was not subject to the PRA, Zaclon may not be assessed a penalty for failing to timely comply with the request. The complaint will be dismissed.

Discussion

Zaclon raised the PRA defense by a motion to supplement its pre-hearing exchange, dated November 2, 1994, one week prior to the hearing. Complainant filed a motion in limine to exclude evidence and arguments relating to the PRA, alleging that the PRA was an affirmative defense which had been waived, because it was not asserted in the answer or in prior pleadings. Complainant contended that it would be prejudiced, if Zaclon was allowed to raise the Act as a defense for the first time so near the hearing date. The ALJ ruled that evidence relating to the PRA would be received and that, if this ruling required the taking of additional evidence, the matter would be addressed at a later date. The only evidence relating to the PRA in the record is Mr. Campbell's testimony that the September 20 letter to Zaclon did not bear or

display OMB control numbers (finding 11). This testimony is supported by the copy of the letter in the record. Additionally, the copy contains no statement or indication that the request was not subject to OMB review under the PRA.[5/]

Zaclon asserts that the PRA is an absolute bar to the imposition of any penalty against it and suggests that Complainant was required to demonstrate compliance with the Act as part of its prima facie case (Brief at 5-8). Complainant points out that a true affirmative defense, which is avoiding in nature, raises matters outside the scope of Complainant's prima facie case, citing, among others, In re New Waterbury, Ltd., TSCA Appeal No. 93-2 (EAB, October 20, 1994) (Reply Brief at 5-9).

Because the issues of whether Zaclon violated RCRA as alleged in the complaint and, if so, what is an appropriate penalty therefor, are separate and independent from the question of whether EPA's request was in compliance with the PRA, it is concluded that the PRA is an affirmative defense. The general rule is that an affirmative defense is to be specifically pled in the answer (FRCP Rule 8(c); Rules of Practice, 40 CFR § 22.15(b)(1)--answer shall include the circumstances or arguments which are alleged to

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5/ If the letter had contained a statement that it was not subject to the PRA, this would indicate that the Agency was perhaps relying on the "administrative action or investigation" exception in the Act (44 USCS § 3518(c)(1)(B)(ii)). There is no indication, however, that the information requested had any independent basis, e.g., RCRA § 3007, and inasmuch as it is concluded herein that the underlying regulation (40 CFR § 270.1(c)) may not be enforced by the exaction of a penalty, the inclusion of such a statement would not have assisted Complainant.

constitute the grounds of defense). Zaclon's contention that the PRA is encompassed within its second, seventh, and tenth defenses, i.e., the September 20 letter was not a lawfully issued order which is enforceable against Zaclon, the proposed penalty is unreasonable and unwarranted, and the complaint fails in whole or in part to state a claim, respectively, is rejected.[6/] A holding that the PRA was encompassed within such general or catch-all defenses would defeat the purpose of requiring affirmative defenses to be specifically pleaded, which is to assure that the real or controlling issues in a case are tried and to avoid surprise.

Although Zaclon raised the PRA as a defense by a motion dated one week prior to the hearing, Complainant's argument that the PRA has been waived is rejected. In United States v. Bethlehem Steel Corporation, Civil No. H 90-326 (N.D. Indiana, 1993), Bethlehem raised the PRA for the first time by a motion for summary

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[6/] Assuming, arguendo, that the September 20 letter was subject to, but not in compliance with, the PRA, it may not properly be characterized "as unlawful". This is because failure to comply with the PRA does not repeal the underlying rule or regulation. See "Federal Management Reorganization and Cost Control Act of 1986", Report 99-347 to accompany S. 230 (July 31, 1986), quoted in the preamble to OMB's implementation of the 1986 amendments to the PRA, 53 Fed. Reg. 16618-623 at 16621 (May 10, 1988): If an agency fails to resubmit a collection of information requirement after its clearance expires, the public protection clause of the Act would preclude the agency from penalizing persons who fail to respond to the collection of information requirement. However, the rule requiring the collection of information would remain in effect.... See also 5 CFR § 1320.5. Whether the "lawful" request in the September request may be enforced by the assessment of a penalty is, of course, a separate question.

judgment on the day a penalty hearing commenced (excerpt from bench opinion attached to Complainant's motion in limine). While the court ruled that the PRA had been waived, it did not do so "out of hand", but included the following language in its opinion: Precedent is clear that if a defendant continually fails to raise an affirmative defense in its answer and throughout the proceedings, it waives the right to utilize such a defense at trial, citing VanSchouwen v. Connaught Corporation, 782 F.Supp. 1240 (N.D. Ill. 1991). Zaclon may not be held to have continually failed to raise the PRA "throughout the proceedings". Moreover, a pretrial order issued pursuant to FRCP Rule 16(e) may be modified only to "prevent manifest injustice". The Part 22 rules applicable here contain no comparable provision and accordingly, even if the order of October 6, 1993, indicating that the only remaining issue was the amount of the penalty, is regarded as a pretrial order, the FRCP limitation on modifying the order has no application.

In ROI Development Corporation, Docket No. RCRA (3008) VIII-90-12 (Initial Decision, March 31, 1994), a similar argument that respondent had waived the PRA, because it was not included in its answer, was rejected. Although it is not clear precisely when the PRA defense was injected into the proceeding, Judge Head indicated that the waiver argument was perhaps valid when such a defense is first raised on appeal, but had no application at the

trial level [in an administrative proceeding].[7/] This reasoning resonates here, because, although Complainant has alleged that it will be prejudiced if the PRA defense is allowed, no prejudice has been shown. In this regard, the ALJ's ruling permitting the introduction of evidence relating to the PRA recognized that [because the defense was raised so near the hearing date] the taking of additional evidence might be required. The only additional evidence offered by Complainant is the affidavit of Mr. Stephen Bouchard (finding 12) attached to its reply brief. Complainant's motion that the affidavit be accepted into the record will be granted. The motion to exclude and/or strike evidence and arguments relating to the PRA will be denied.

On its face, the September 20 letter sought information during the conduct of "an administrative action or investigation involving an agency against specific individuals or entities" as specified in 44 USCS § 3518(c)(1)(B)(ii). The OMB regulation, 5 CFR § 1320.3(c), adds the proviso that this exemption is applicable "only after a case file or its equivalent is opened with respect to a particular party." Mr. Bouchard's affidavit is to the affect that the September 20 letter was sent to Zaclon to determine its compliance with HSWA regulations (40 CFR § 270.1(c)(5) and (6)), because EPA records indicated that an interim status HMU had been closed at the facility, and that a facility case file had been

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[7/] Slip opinion at 20. Judge Head's decision is in consonance with In re Bickford, Docket No. TSCA-V-C-052-92 (Initial Decision, October 18, 1995), wherein the PRA was raised post-hearing sua sponte by the ALJ.

opened with regard to Zaclon. This evidence is sufficient to establish prima facie that the "administrative action and/or investigation" exemption provided by 44 USCS § 3518(c)(1)(B)(ii) applies.

Zaclon's real argument, however, appears to be that the September 20 letter is not enforceable [by the assessment of a penalty], because an OMB control number was not validly displayed on either the letter or the underlying regulation, 40 CFR § 270.1 (c), which requires submission of the information (Brief at 5-7). Zaclon points out that OMB approval numbers are now assigned to this very program (58 Fed. Reg. 27472, May 10, 1993; 40 CFR Part 9). It is concluded that this contention must be sustained.

There is no question but that the underlying regulation, (40 CFR § 270.1(c)(5) and (6)), requiring interim status units, which closed by decontamination or removal under Part 265 standards, to have Part B post-closure permits or to submit an equivalency demonstration and the September 20 letter requesting Zaclon to either submit a Part B post-closure permit application or an equivalency demonstration constitute an "information collection request" as defined in the PRA and the OMB regulation. The Act (44 USCS § 3502(11)) provides: the 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.

The OMB regulation (5 CFR § 1320.7) provides in pertinent part: (c) Collection of information means the obtaining or soliciting of information by an agency from ten or more persons by means of identical questions, or identical reporting or recordkeeping requirements, whether such collection of information is mandatory, voluntary, or required to obtain a benefit. For purposes of this definition, the obtaining or soliciting of information includes any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information.

RCRA § 3005(i) requires that standards applicable to new landfills, surface impoundments, land treatment units, and waste-pile units shall also apply to such units qualifying to operate under subsection (e) of this section [interim status] which received hazardous waste after July 26, 1982. While this section almost certainly contemplates that the applicable standards will be applied to interim status units subject to the section by means of permits, no argument has or could properly be made that the PRA was not applicable because the information at issue was required by statute.

Section 2(a) of the Paperwork Reduction Act (44 USCS § 3512), entitled "Public protection", provides:

> 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 request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter [44 USCS §§ 3501 et seq.].

Complainant points out that "display" is not defined in the PRA and relies on an opinion by the Acting General Counsel of OMB as set forth in a letter to the Acting General Counsel of EPA, dated May 28, 1993, to the effect that including an OMB control number in the preamble to the final rule or in a separate notice in the Federal Register was sufficient under the circumstances to satisfy the display requirement of the Act and OMB's regulations (Reply Brief at 17-21). The problem with this argument and the Acting General Counsel's opinion is that the definition of "display" in the regulation is flatly and clearly to the contrary. The regulation, 5 CFR § 1320.7, provides in pertinent part:

> (e) Display means:
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> (1) In the case of forms, questionnaires, instructions, and other collections of information, individually distributed to potential respondents, to print the OMB control number (and unless OMB determines it to be inappropriate, the expiration date) in the upper right hand corner of the front page of the collection of information;
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> (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) and ensure that it will be included in the Code of Federal Regulations if the issuance is also included therein;
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> (3).....

The quoted language clearly requires that a regulation providing for the "collection of information" display an OMB control number as part of the regulatory text or as a technical amendment and that the control number be published in the Code of Federal Regulations, if the regulation requiring the collection of

information is published therein. OMB clearly intended that control numbers be included in the regulatory text and the Code of Federal Regulations.[8/] EPA did not comply with this requirement insofar as the regulation at issue here (40 CFR § 270.1(c)) is concerned until the publication of 40 CFR Part 9 (58 Fed. Reg. 27472, May 10, 1993), which states that it fulfills the requirements of section 3507(f) of the PRA.

The consequence of failing to "display" an OMB control number or numbers on an information collection request is set forth in the Act (44 USCS § 3512) quoted supra, and in the regulation, 5 CFR § 1320.5, entitled "Public protection", which provides in pertinent part:

> (a) 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; or.....
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> (c) Whenever a member of the public is protected from imposition of a penalty under this section for failure to comply with a collection of information, such penalty may not be imposed by an agency directly, by an agency through judicial process, or by any other person through judicial or administrative process.

[8/] See the preamble to the final OMB rule, 48 Fed. Reg. 13676, March 31, 1983, which provides in pertinent part: (f) Display § 1320.7. A number of minor changes have been made in this paragraph to improve clarity. Most significant was the addition of the phrase "(as part of the regulatory text or as a technical amendment)" into subparagraph 7(f)(2) to indicate more clearly that OMB intends for agencies to incorporate OMB control numbers into the text of regulations so that the numbers will appear in the regulations as published in the Code of Federal Regulations. Publication of control numbers in the preamble to regulations would not have accomplished this purpose. This paragraph reflects current OMB practice.

In the face of such clear statutory and regulatory provisions, there is simply no room for arguments that something less than literal compliance with the display requirements of the Act and regulation will suffice to enable the Agency to exact a penalty for Zaclon's failure to timely comply with the information collection request at issue here. Accordingly, arguments such as those advanced by the OMB General Counsel and Complainant herein (Reply Brief at 17 et seq.) to the effect that publication of the OMB control number in the preamble to the regulation together with Zaclon's alleged constructive knowledge [from the business in which it is engaged] that it is subject to pervasive regulation for the protection of public health constitute compliance with the display requirements of the act and regulation are rejected. See In re Lazarus, Incorporated, Docket No. TSCA-V-C-32-92 (Initial Decision, May 25, 1995), which rejected the OMB General Counsel's opinion as contrary to the plain language of the regulation and the preamble thereto. See also In re Bickford, supra note 7.

Lazarus indicates, however, that a respondent's actual notice that OMB had approved an information collection request would suffice, because the purpose of the display requirement is to give notice of such approval and, to hold otherwise, would elevate the form of such notice over the question of whether respondent, in fact, had notice of OMB's approval. Be that as it may, the

practical application of this exception is limited, because the instances where the Agency will be able to establish that a respondent had actual notice of OMB's approval of an information collection request, which is not in compliance with the display requirement of the Act and regulation, will be rare indeed. The purpose of requiring an OMB control number to be displayed in the text of a regulation which constitutes or requires the collection of information is to preclude arguments of constructive notice such as those advanced by Complainant herein. In this regard, Complainant alleges that the September 20 request letter to Zaclon enclosed a copy of the very Federal Register [which included the OMB control numbers], implying that the enclosure included the preamble as well as the regulation, 40 CFR § 270.1(c) (Reply Brief at 21). While the regulation, including the preamble, as published (52 Fed. Reg. 45788, December 1, 1987), is entitled "Hazardous Waste: Codification Rule for the 1984 RCRA Amendments" and the letter refers to the enclosure as the "December 1, 1987, Codification Rule", I am unpersuaded, in the absence of evidence to the contrary, that the Agency distributed the preamble as well as the regulation to firms such as Zaclon over two and one-half years after the effective date of the regulation.

Because the PRA precludes the exaction of a penalty for Zaclon's failure to timely comply with the request letter, dated September 20, 1990, the complaint will be dismissed.

ORDER

Complainant's motion to exclude and/or strike evidence and arguments relating to the PRA is denied. The affidavit of Mr. Stephen M. Bouchard is admitted into evidence. The complaint is dismissed.[9/]

Dated this 19th day of March 1996.

Spencer T. Nissen
Administrative Law Judge

9/ Unless this decision is appealed to the Environmental Appeals Board (EAB) in accordance with Rule 22.30 (40 CFR Part 22), or unless the EAB elects to review the same sua sponte as therein provided, the decision will become the final order of the EAB in accordance with Rule 22.27(c).