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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Parke-Davis Division	)	Docket No. RCRA-V-W-
28-93		
Warner-Lambert Company,	)	
	)	
Respondent	)	

ORDER GRANTING RESPONDENT'S  
MOTION FOR ACCELERATED DECISION

The Parke-Davis Division of Warner-Lambert Company ("Parke-Davis") has filed a motion for accelerated decision seeking dismissal of Count I of the complaint. 40 C.F.R. § 22.20. The U.S. Environmental Protection Agency ("EPA") opposes this motion. Parke-Davis seeks accelerated decision on the ground that EPA failed to comply with the Paperwork Reduction Act, 44 U.S.C. § 3501 et seq. ("PRA"). For the reasons set forth below, the motion is granted and Count I of the complaint is dismissed.

I. Background

A. The Complaint

This matter arises under Section 3008(a)(1) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928(a)(1). It involves 40 C.F.R. Part 266, Subpart H ("Hazardous Waste Burned in Boilers and Industrial Furnaces"), otherwise known as the "BIF regulation." Pursuant to 40 C.F.R. 266.103(a)(4), owners and operators of boilers and industrial furnaces that burn hazardous waste and are operating under interim status are, as of August 21, 1991, subject to certain provisions of 40 C.F.R. Part 265, Subpart B ("General Facility Standards"), Subpart D ("Contingency Plan and Emergency Procedures"), and Subpart G ("Closure and Post-Closure"). Parke-Davis is such an operator. <sup>(1)</sup>

In Count I of the complaint, EPA alleges that Parke-Davis violated several of the Part 265 regulations. The regulations alleged to have been violated are as follows: Section 265.13 ("General waste analysis"); Section 265.15 ("General inspection requirements"); Section 265.16 ("Personnel training"); Section 265.54 ("Amendment

of contingency plan");<sup>(2)</sup> and Section 265.112 ("Closure plan; amendment of plan).

#### B. The Paperwork Reduction Act

Congress enacted the PRA to minimize paperwork demands imposed on the public by the Federal government. S. Rep. No. 96-930, 96th Cong., 2d Sess. 2 (1980). To this end, Congress delegated to the Director of the Office of Management and Budget ("OMB") the responsibility to ensure that all such paperwork demands receive prior scrutiny to ensure that the information requested from the public is "needed, not duplicative and collected efficiently." *Id.*

Specifically, the PRA requires OMB to "develop and implement Federal information policies, principles, standards, and guidelines and ... provide direction and oversee the review and approval of information collection requests." 44 U.S.C. § 3504. Each agency, in turn, must comply with the policies, principles, standards, and guidelines prescribed by OMB.

44 U.S.C. § 3506(a).

In addition, even before an agency requests information from the public, it must submit the proposed Information Collection Request ("ICR") to OMB, publish in the Federal Register a notice of the informational request, and obtain OMB approval before collecting the noticed information. 44 U.S.C. § 3507(a). The OMB control number on the ICR signifies that the agency has satisfied these PRA requirements. 44 U.S.C. §§ 3504(c)(3) & 3507(f). The OMB/ICR control numbers are valid for three years only and thereafter lapse, if not renewed. 44 U.S.C. § 3507(d).

## II. Discussion

Count I involves five separate information request regulations. As for each of these Part 265 regulations, EPA concedes "that certain lapses in OMB approval occurred for the information collection requests." Mem. In Opp. at 2. EPA admits that complete lapses of OMB approval occurred with respect to three of the regulations, Sections 265.13, 265.15, and 265.16. EPA also admits that partial lapses in OMB approval occurred with respect to the remaining two regulations, Sections 265.54 and 265.112. Mem. In Opp. at 2-3.

#### A. The Waiver Argument

EPA's first line of defense to Parke-Davis' motion is that non-compliance with the Paperwork Reduction Act is an affirmative defense which respondent waived by failing to raise in its answer.<sup>(3)</sup> EPA asserts that Parke-Davis could only raise this affirmative defense in answer to the complaint, and not by way of a subsequent motion. This argument is rejected.

Contrary to EPA's position, a failure to comply with the PRA is a defense that may be raised by a respondent even after an answer has been filed. *Lazarus, Inc.*, TSCA Appeal No. 95-2 (September 30, 1997)(EAB); *Zalcon Inc.*, RCRA-V-W-92-R (March 19, 1996) (ALJ). See *Wright & Miller, Federal Practice and Procedure*, Vol. 5, § 1277 at 463.

In *Lazarus*, the Environmental Appeals Board ("EAB") recently found no error in the respondent's being allowed to raise a PRA defense after an answer had been filed and just three weeks before the scheduled hearing. The EAB observed:

...[O]ur 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.

Slip Op. at 17-18.

The EAB further observed in *Lazarus* that a PRA defense could be barred in a proceeding, but only if it is so untimely as to prejudice the complainant, or

"interfere with the [judge's] duty to conduct an efficient adjudication." Slip op. at 18. Here, EPA does not argue that it was prejudiced; nor, given the prehearing status of this case could it substantiate such an argument.

Accordingly, inasmuch as EPA has admitted that OMB approval was absent for the entire time that the Section 265.13, 265.15, and 265.16, violations allegedly occurred, and given the holding in this case that the PRA defense was properly raised by Parke-Davis, EPA is barred from prosecuting the respondent for these three alleged violations.

With respect to the Section 265.54 and Section 265.112 alleged violations, however, EPA raises additional arguments in opposition to Parke-Davis' motion for accelerated decision. These arguments are discussed below.

#### B. EPA's Alternative Arguments

With respect to Section 265.54, EPA asserts that there was only a partial lapse in OMB approval. In that regard, EPA states that for a 40-day period, "an incorrect but current OMB control number" was displayed in the Code of Federal Regulations. It also states that OMB's approval of Section 265.54 was published in the Federal Register. Mem. In Opp. at 7-10. EPA submits that this publication satisfied the PRA requirements concerning OMB approval.

As for Section 265.112, EPA also submits that only a partial lapse occurred. With respect to this regulation, EPA asserts that the PRA clearance requirements were satisfied for a 162-day period. In support of this position, EPA states that a "blanket display" evidencing OMB approval appeared at the end of 40 C.F.R. 265.120. The complainant also notes that the OMB approval number was displayed in the Federal Register. See 51 Fed. Reg. 16422 (May 2, 1986). Mem. In Opp. at 10.

On their face, the arguments advanced by EPA have a certain appeal. EPA essentially argues that there was compliance with the Paperwork Reduction Act because Sections 265.54 and 265.112 did in fact receive Office of Management and Budget approval. Moreover, EPA further argues that Parke-Davis could have found out about this OMB approval if only it had searched hard enough. Therefore, looking at the big picture, EPA concludes that the OMB clearance provisions of the PRA were satisfied.

Again, while EPA's arguments have a certain practical appeal, nonetheless they must fail in light of the plain wording of the PRA and implementing regulations of OMB. In that regard, the PRA unambiguously requires that the agency display the OMB control number on the ICR. 44 U.S.C. § 3507(f). Furthermore, the OMB regulations define "display" to mean publishing the control number in both the Federal Register and the Code of Federal Regulations. 5 C.F.R. 1320.7(e)(1991). These requirements were not met by EPA with respect to Sections 265.54 and 265.112.

Arguing to the contrary, with respect to Section 265.54, in a footnote EPA relies upon the District Court's decision in *Ortiz v. Eichler*, 616 F.Supp. 1046, 1061 n.10 (D.Del. 1985). Mem. In. Opp. at 9, n.10. EPA cites *Ortiz* for the proposition that, "[a] simple control number editing error in the CFR should not affect the validity of an OMB-approved regulation." Mem. Op. at 9. In *Ortiz*, the Court held that a 1983 regulation remained in force even though an editing error caused a portion of the regulation to be deleted in later editions of the Code of Federal Regulations. EPA's reliance upon *Ortiz*, however, is not persuasive. The failure of EPA to publish the correct OMB control number for Section 265.54 is a failure to comply with the plain wording of the PRA and its implementing regulations. This is a substantive failure to comply, not at all analogous to the "editing" problem at issue in *Ortiz*.

As for Section 265.112, EPA argues that a "blanket display" of the OMB-approved control number at the end of Part 265, Subpart G, satisfies the PRA requirements involved in this case. EPA's argument again is misplaced. As stated earlier, the manner in which EPA sought to publish the OMB control number for Section 265.112 simply is not in accord with the involved statutory and regulatory language. See *Cytec Industries, Inc.*, V-W-009-94 (July 31, 1996)(ALJ); see also, *Zalcon, Inc.*,

RCRA-V-W-92-R-9 (March 19, 1996)(ALJ). These statutory and regulatory provisions require more than the "blanket display" publication relied upon by EPA. [\(5\)](#)

ORDER

For the reasons set forth above, Count I of the complaint filed by the U.S. Environmental Protection Agency is *dismissed, with prejudice*.

Carl C. Charneski

Administrative Law Judge

Issued: January 7, 1998

Washington, D.C.

1. Parke-Davis admits that it was the owner and operator of a facility located in Holland, Michigan, that "burned limited quantities of hazardous waste" during the time periods referenced in EPA's complaint. Answer, ¶¶ 3 & 4.
2. The complaint actually lists Section 265.51 as the regulation allegedly violated. Even though the complaint has not been amended, the parties argue that Section 265.54, and not Section 265.51, is the regulation at issue.
3. EPA appears to have overlooked the fact that Parke-Davis could still amend its answer pursuant to 40 C.F.R. 22.15(e).
4. For this same reason, EPA's Federal Register publication arguments are similarly rejected.
5. In any event, it is not clear from this limited record that OMB actually approved Section 265.112 for the time period at issue in this case, as EPA asserts.

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