

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

GORDON REDD LUMBER COMPANY,

Respondent

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RCRA Docket No. 88-01-R

1. Resource Conservation and Recovery Act - Penalty assessed for the creation of a new hazardous waste facility without notification to either the State of EPA or the filing of an amended Part A application, including a credit for a State imposed penalty for the same offense.

2. Resource Conservation and Recovery Act - State Action: The record reveals that the authorized State Agency excused the Respondent from complying with the Part 265 requirements and thus the violations relative to those counts are dismissed.

3. Resource Conservation and Recovery Act - Order Portion: The Order issued requires the Respondent to abide by all requirements of relevant State Orders, including the cessation of placing K001 waste in garbage bags pending off-site disposal.

4. Resource Conservation and Recovery Act - Notice to the State: The jurisdiction issues raised by the Respondent alleging insufficient prior notice to the State are denied.

Appearances:

Zylpha K. Prior, Esquire
William B. Bush, Jr., Esquire
U.S. Environmental Protection Agency
Atlanta, Georgia
(For the Complainant)

John A. Crawford, Esquire
Butler, Snow, O'Mara, Stevens & Cannada
Jackson, Mississippi
(For the Respondent)

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INITIAL DECISION

This proceeding under § 3008 of the Solid Waste Disposal Act, (hereafter "the Act") as amended, (RCRA) (42 U.S.C. § 6928) was commenced on December 30, 1987, by the issuance of a Complaint Compliance Order by the Director of Waste Management Division, U.S. EPA, Region IV, Atlanta, Georgia, charging the Respondent with violations of the Act, regulations and corresponding sections of the Mississippi Administrative Code.

The original Complaint listed the Respondent as a corporation and in response thereto, the Respondent filed a motion to dismiss on the grounds that the Respondent is not a corporation but rather an individual doing business as Gordon Redd Lumber Company ("GRLC")

Since no Answer had been filed, the Agency filed an Amended Complaint on March 18, 1988, correctly identifying the Respondent as an individual and making minor changes in the original Complaint but essentially alleging the same violations and assessing the same penalty, i.e. \$75,000. The Respondent filed another motion to dismiss which the Court has not ruled on, but was by implication, denied since the matter eventually proceeded to hearing. In case there exists any doubt as to the Court's position on this motion, it is hereby DENIED, since the Agency by virtue of 40 CFR § 22.14(d) may issue an Amended Complaint as a matter of right since no true Answer was actually filed to the original Complaint. A motion to dismiss does not, under the Rules of Practice, constitute an Answer.

Before discussing the particulars of this case, a

jurisdictional issue raised by the Respondent must be addressed. The Respondent alleges that the notice given to the State, pursuant to the Act, prior to the commencement of this action was deficient as not being in accord with the Memorandum of Agreement ("MOA"), in force upon the date of the issuance of the Amended Complaint and thus the action must be dismissed. There was initially a dispute between the parties as to which MOA was in effect on the relevant date. The Agency initially argued that an MOA which only requires a phone call to the State Agency to be followed by a written notice of overfiling is sufficient to constitute the required notice. The Respondent argues that a later MOA is the controlling document. This later MOA states, as to such notice that:

Such written notice will set forth, in detail, the reasons that EPA has concluded that the State has not taken timely and appropriate enforce action. After notification to the State, EPA may initiate enforcement action on Class I violations when EPA is the lead inspector.
[1987 MOA, p. 26 paragraph 4]

By letter dated May 7, 1991, the Agency now concedes that the Respondent is correct and that the later MOA is the one in effect at the time of the issuance of the Amended Complaint, but argues that the written notice given to the State conforms to the more stringent requirements as quoted above. I have carefully read the notice letter dated July 31, 1981, from James Scarbrough, Chief, RCRA Branch to Mr. Sam Mabry, Director, Division of Solid/Hazardous Waste Management, Mississippi Department of Natural Resources, which is Complainant's Exhibit No. 37. The letter lists the failure of the State to impose a penalty on the Respondent for operation of a hazardous waste management unit without a permit or

interim status and then cites ten additional regulatory violations for which the State failed to cite the Respondent. I am of the opinion that the Agency's notice letter is in substantial compliance with the above-quoted language in the relevant MOA.

The Respondent also argues that a new notice to the State was required prior to the filing of the Amended Complaint. The Respondent cites no authority for this novel defense and the Court could find none following its own research. The Agency argues that once a Notice of Intent to overfile is sent to the proper State official, it remains in effect until withdrawn or rescinded. I agree. I am therefore of the opinion that the Respondent's arguments involving this jurisdictional issue are without merit and its position that the Complaint should be dismissed is DENIED.

The allegations and violations set forth in the Amended Complaint are as follows:

1. Respondent is Gordon Redd, an individual doing business as GRLC in the State of Mississippi and is a person as defined in § 1004(15) of RCRA, 42 U.S.C. § 6903(15)
2. Respondent owns and operates an existing hazardous waste management facility (creosote wood treating facility) located at Industrial Park Road, Lincoln County, Brookhaven, Mississippi (hereafter "the facility").
3. Respondent began operation or commenced construction of said facility on or about July 1, 1979.
4. Respondent utilizes creosote as a wood preservative, and generates creosote-contaminated wastewater.
5. Respondent did not achieve interim status because it did not file a Notification of Hazardous Waste Activity ("NHWA") pursuant to § 3010 of RCRA on or before November 19, 1980.
6. Respondent filed a NHWA dated November 23, 1981.
7. On or after November 19, 1980, the Respondent has disposed

of and/or stored hazardous waste which has been identified and listed as hazardous waste under § 3001 of RCRA and 40 CFR Part 261, without a permit and without having achieved interim status.

8. From 1979 when the facility began operation, until mid-1984, Respondent operated two surface impoundments and serpentine channel used for the disposal and/or storage of bottom sediment sludge from the treatment of wastewater from the wood preserving processes.

9. This bottom sediment sludge is identified in 40 CFR Part 261, Subpart D, § 261.32, as listed hazardous waste from the wood preservation industry (EPA hazardous waste number K001).

10. The two surface impoundments are currently undergoing closure, and purportedly have not received waste since the Spring of 1984.

11. Respondent has indicated its intent to clean-close the surface impoundments and serpentine channel.

12. Presently, wastewater from the facility's creosote cylinders is collected in catch basins and pumped to one of two sand filters for pretreatment prior to being discharged to the Brookhaven publicly owned treatment works ("POTW").

13. Periodically, the K001 sludge is removed from the top of the sand filters and placed in plastic garbage bags.

14. On August 26, 1986, the Mississippi Commission on Natural Resources ("MCNR") issued Commission Order Number 1082-86, approving Respondent's closure plan of September 27, 1985, with certain modifications as specified in the Order and notification letter dated September 5, 1986. Said Order required Respondent to, among other things, submit by March 30, 1987, a certification of closure as approved in the closure plan in accordance with § 265.115 NHWMR (40 CFR Part 265, § 265.115).

15. On January 28, 1987, the MCNR issued Commission Order Number 1171-87, requiring Respondent to comply with the financial responsibility provisions of § 265.147 MHWMR (40 CFR Part 265, Subpart H, § 265.147), not later than the date on which certification of closure in accordance with the closure plan was scheduled to be submitted (i.e., March 30, 1987).

16. Respondent did not submit certification of closure for the surface impoundments in accordance with § 265.115, by March 30, 1987, as required by the approved closure plan, and further, has not done so as of the date of this Order. [The March 30, 1987 date was extended by the State and the facility

was certified clean-closed as of April 13, 1987 Court's language].

17. Respondent did not comply with the financial responsibility provisions of § 265.147 by March 30, 1987, as required by Commission Order Number 1171-87, and has not done so as of the date of this Order.

18. State and EPA representatives conducted an on-site inspection of Respondent's facility on February 18, 1987, and found the following:

A. The two surface impoundments are not receiving wastewater from the processes, and, as indicated above, are currently undergoing closure.

B. The plastic garbage bags containing K001 waste from the sand filters were being stored on wooden pallets in a clearing in a wooded area on plant property (hereafter referred to as "the new waste piles/storage area").

C. Piles of K001 waste were found in the same wooded area referred to in paragraph B above.

19. Many of the findings from the February 18, 1987, inspection and subsequent file reviews pertain to both hazardous waste management units - that is, the existing surface impoundments and the new waste piles/storage area. Findings common to these hazardous waste management units are as follows:

A. There was not hazardous waste analysis plan or records available on-site.

B. There were no provisions to prevent unknowing entry, and to minimize the possibility for the unauthorized entry onto the active portion of the facility.

C. There was no inspection schedule or inspection records available for review.

D. There were no personnel training records available on-site.

E. The facility was not being maintained and operated so as to minimize the possibility of release of hazardous waste constituents to the environment.

F. No safety equipment was present or maintained on-site.

G. There was no evidence that arrangements had been made

with local or state emergency authorities.

H. There was no copy of the contingency plan available on-site.

I. There was no evidence that an employee had been identified as the emergency coordinator.

J. There were no operating records available on-site.

K. Respondent does not have and maintain financial responsibility for bodily injury and property damage to third parties caused by sudden (for both the surface impoundments and waste piles/storage area) non-sudden (for the surface impoundments only) accidental occurrences arising from the operation of the facility.

20. In addition, findings from the February 1987 inspection that pertain only to new waste piles/storage area are as follows:

A. Respondent did not complete and submit a permit application for a new hazardous waste management facility.

B. Respondent did not properly use and manage containers of hazardous waste.

C. There were no detection monitoring program in place.

D. There was no closure plan for the waste piles/container storage area.

E. Respondent did not develop a cost estimate and establish financial assurance for closure.

F. The design and operational requirements, and monitoring and inspection requirements, for waste piles were not being met.

The Respondent filed its Answer to the Amended Complaint on April 11, 1988, in which he essentially denied all the counts in the Complaint and raised five specific defenses. The Court will paraphrase them as follows:

1. Sudden and non-sudden insurance is and was not available to the Respondent and thus the Compliance Order requiring such insurance is confiscatory and in violation of the due process clauses of the Mississippi and United States Constitution.

2. The Mississippi Agency has primary jurisdiction to enforce RCRA and therefore the Complaint is in violation of the existing MOA.

3. The Mississippi Agency has already enforced the identical issues in the Complaint and the Agency is therefore estopped, pre-empted and precluded from relitigating identical issues. He also raised constitutional issues.

3. The Respondent is entitled to a variance from the requirements to obtain insurance since the Respondent's current financial ability exceeds the degree and duration of the risk presented by his operation.

4. Since the surface ponds at issue were certified clean-closed by the State Agency on April 13, 1987 and the Respondent ceased depositing waste therein in the Spring of 1984, the requirements of § 265 of the regulations are not applicable to him.

5. He denied that the temporary holding of K001 sludge in garbage bags pending its transportation to an off-site disposal facility constituted the creation of a new hazardous waste management facility. He also denied any liability under 40 CFR Parts 254, 265 and 270.

FACTUAL BACKGROUND

The Agency initial Brief provides an accurate and reliable description of the events leading to the issuance of the Complaint in this matter and will be utilized by the Court. Any legal conclusions contained therein are not necessarily adopted by the Court. The Brief states as follows:

"The Respondent, Gordon Redd, owns and operates a creosote wood treating facility located at Industrial Park Road in Brookhaven, Mississippi. At his facility, which has been in existence since July 1, 1979, Respondent utilizes creosote as a wood preservative, generating creosote contaminated wastewater.

Prior to 1985, the creosote contaminated wastewater was collected in two surface impoundments at the facility. K001 sludge separated out from the wastewater, settling on the bottom of the impoundments. Some time in 1984, sand filters and a treatment system were installed and contaminated wastewater ceased to be channelled to the impoundments. As

part of the new treatment system, the sand filters were used to dry and solidify collected sludge. The underflow from the sand filters and any other wastewater flowed to a series of calgon carbon absorption filters and then to a local POTW. [See Transcript pp. 63 - 67 for foregoing discussion of facility processes; and Respondent's May 23, 1988 Answer].

On February 23, 1982, the State conducted an interim status inspection of GRLC. At that time, numerous interim status violations were discovered. [Exhibits 3 and 55].¹ The State notified Gordon Redd by letter of the deficiencies but did not assess a penalty for the violations. [Exhibit 5]. The State continued to inspect the facility and found that the violations remained outstanding at the end of 1982.

On June 24, 1985, the State issued a Complaint to Respondent citing a failure on his part to conduct groundwater sampling and analysis. [Exhibit 10]. Pursuant to a July 10, 1985 hearing, the State issued an Order which required that the facility sample and analyze the groundwater. The \$5,000 penalty assessed in the Order was held in abeyance pending compliance with the State Order.

By letter dated January 9, 1986, EPA notified the State that the GRLC facility was one of fifteen land disposal facilities in Mississippi that had not certified compliance with the financial responsibility requirements by the statutory deadline of November 8, 1985. [Exhibit 17]. By Order dated May 23, 1986, the State found Respondent in violation of the requirement to provide financial insurance and directed that proof of compliance with the requirement be submitted by June 23, 1986. [Exhibit 19].

Respondent requested a variance from the financial responsibility requirements. The variance was not granted, but by a January 1987 State Order, Respondent was directed to demonstrate financial responsibility not later than the date scheduled for certification of closure. [Exhibit 26]. An August 1986 State Order set March 30, 1987, as the date by which Gordon Redd was to certify closure. [Exhibit 24].

EPA and State personnel conducted an inspection of GRLC on February 18, 1987. Paul Peronard and Tony Able, EPA compliance inspectors, and Undine Johnson and Mike Bradshaw, State inspectors, were escorted by Terry Smith of GRLC. The

¹ All references to exhibits herein are to Complainant's exhibits unless state otherwise.

inspection revealed over twenty Class I RCRA violations. Most of these were violations which had been found during the

State's 1982 inspection. [Exhibits 3, 28, 29, 55]. Additionally, it was discovered that K001 sludge collected from the sand filters was placed in plastic garbage bags which were taken down a path through a wooded area to a clearing in the woods. In this cleared area, located roughly four hundred yards from the main operations, about one hundred to one hundred and fifty garbage bags full of sludge had been placed on wooden pallets. Several bags had disintegrate, leaving standing piles of K001 on the ground, and other bags were ruptured and leaking. [Exhibits 28, 29, 48; Transcript pp. 66, 77, 78].

The State issued an Order to GRLC on April 22, 1987. [Exhibit 35]. In the Order, Respondent admitted that hazardous waste had been illegally and improperly stored at the facility and agreed to pay a penalty of \$5,000. After reviewing the State Order and penalty calculations, EPA determined that the State penalty was inadequate and that the Order failed to address several important issues. [Exhibits 36]. By letter dated July 31, 1987, EPA notified the State of its intent to overfile. [Exhibit 37].

DISCUSSION

I will first address the situation created by the existence of garbage bags of hazardous waste K001 found by the inspectors during the February 18, 1987, inspection. The record is uncontroverted that approximately 150 garbage bags of K001 waste were found in a wooded area several hundred yards from the Respondent's ongoing operation. The record is also clear that although some of the bags were on wooden pallets, many were on the ground and approximately 50 of them were torn and leaking K001 waste onto the ground.

The Agency alleged that this situation constituted the creation of a new hazardous waste management facility for which the Respondent had no permit and the existence of which was not communicated to either EPA or the Mississippi regulatory authority.

The record is also clear that the placing of the bags of K001

waste in the wooded area did not take place while the facility enjoyed interim status. Such status was lost on November 18, 1985 and the Respondent admitted that they had been there for only a matter of days, i.e. a few days on the inspection dated of February, 1987.

The Respondent first argues that the definition of a "facility" contained in 40 CFR § 260.10(a) refutes EPA's attempt to call this pile of bags a new waste management facility. That regulation states that:

[A]ll contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing or disposing of hazardous waste. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them).

That argument must fail since it is merely a general definition of the term facility which points out that an existing facility may consist of several units of differing natures as identified in the facility's Part A application. It says nothing about a new facility created either before or after the loss of interim status. This argument is rejected.

The Respondent also argues that the bag area was exempt from regulation pursuant to the language of 40 CFR § 264.1(g)(3). That regulations states that:

"The requirements of this part do not apply to:....
(3) a generator accumulating waste on-site in compliance with § 262.34 of this chapter."

40 CFR § 262.34 states, in pertinent part, that:

(a) Except as provided in paragraphs (d), (e, and (f) of this section, a generator may accumulate hazardous waste on-site for 90 days or less without a permit or without having

interim status, provided that:

(1) The waste is placed in containers and the generator complies with Subpart I of 40 CFR Part 265, or the waste is placed in tanks and the generator complies with Subpart J of 40 CFR Part 265, except § 265.197(c), and § 265.200. In addition, such a generator is exempt from all the requirements in Subparts G and H of 40 CFR Part 265, except for § 265.111 and § 265.114.

(2) The date upon which each period of accumulation begins is clearly marked and visible for inspection on each container.

(3) While being accumulated on-site, each container and tank is labeled or marked clearly with the words, "Hazardous Waste"; and

(4) The generator complies with the requirements for owners or operators in Subparts C and D in 40 CFR part 265, with § 265.16, and with 40 CFR 268.7(a)(4).

49 CFR 265 Subpart I 170 et seq. states, in part that:

§ 265.171 Condition of containers.

If a container holding hazardous waste is not in good condition, or if it begins to leak, the owner or operator must transfer the hazardous waste from this container to a container that is in good condition, or manage the waste in some other way that complies with the requirements of this part.

§ 265.173 Management of containers.

(a) A container holding hazardous waste must always be closed during storage, except when it is necessary to add or remove waste.

(b) A container holding hazardous waste must not be opened, handled, or stored in a manner which may rupture the container or cause it to leak.

§ 265.174 Inspections.

The owner or operator must inspect areas where containers are stored, at least weekly, looking for leaks and for deterioration caused by corrosion or other factors.

It should also be noted that the MHWD advised the Respondent by letter dated May 4, 1989 that since it is now designated as a generator of hazardous waste, and since his impoundment is in the process of closure, the K001 sludge generated by his treatment

process must now be stored in tanks or drums.

The letter also advised, inter alia, that the containers holding hazardous must be kept in good condition, have structural integrity and must not leak. He was also advised that the containers holding hazardous waste must always be closed with a sealed lid during storage.

The use of plastic garbage bags to store the hazardous waste is in clear violation of these state requirements.

Obviously, none of the requirements of the above-quoted regulations were met by the actions of the Respondent here. The bags were not marked; they were ruptured and leaking. The dates of the placement in the woods was not on the bags.

40 CFR § 260.10 defines an existing hazardous waste facility as one which was in operation or for which construction commenced on or before November 19, 1980.

The same regulation defines a new hazardous waste management facility as one which began operation after October 21, 1976.

Based upon all of the above, I am of the opinion that the above-described bags of K001 found on the Respondent's property constituted a new hazardous waste management facility, which was not permitted and thus illegally created.

As to the remainder of the counts in the Complaint, the Court is initially a little confused by the Agency's pleadings. On the one hand they allege that the Respondent never achieved interim status yet they later say that he lost interim status on November 8, 1995. How one could lose that which it never had is a mystery

to me.

In any event, the Complainant argues that the Respondent was treated, under the regulations, as being required to comply with the provisions of Part 265 of 40 CFR and that situation gives rise to the majority of the counts set forth in the Complaint for which the Agency proposed a total penalty of \$59,700.

As to these counts, the Respondent argues that the Mississippi Regulatory Agency excused him from complying with § 265 upon their approval of his closure plan under which the Respondent was to clean-close the waste ponds and serpentine channel. In support of the argument, the Respondent points to a Commission Order dated March 9, 1983, which appears as Respondent Exhibit No. 42. Although this Order does not specifically excuse the Respondent from complying with Part 265, it seems to do so by implication. The intent of the MCNR to so excuse the Respondent was testified to by the Respondent's environmental consultant who attended several meetings with his client and the MCNR. Mr. Martin Rollins, the consultant hired by the Respondent to prepare a closure plan for the facility, testified on pp. 1089, 1099, 1101 that, in his opinion, there was no doubt that the MCNR had given Mr. Redd a waiver from complying with the 265 requirements, in part, because Mr. Redd had agreed to let the state use his facility as a test site to aid the State in the development of a Risk Assessment Model ("RAM"). The State hired a consultant and the model was developed, but was later disapproved by the EPA.

Two other factors seem to support the Respondent's argument

that the 265 requirements were waived as to him by the State Agency. One is that the above-cited Order sets forth a number of requirements to be met by Mr. Redd as follows:

1. On or before April 11, 1983, Respondent shall file with the Bureau of Pollution Control designs and drawings of the proposed new treating equipment to be provided so as to eliminate the need for an impoundment.
2. On or before April 11, 1983, Respondent shall file with the Bureau any changes to the previously submitted closure plan that Respondent contemplates submitting prior to final approval of the plan.
3. On or before April 11, 1983, Respondent shall file with the Bureau proof of financial assurance for closure of the impoundment, including a letter of credit and standby trust fund.
4. On or before May 31, 1983, Respondent shall begin the closure of the hazardous waste impoundment in accordance with the closure plan as approved by the Permit Board.
5. On or before November 30, 1983, Respondent shall complete closure of the hazardous waste impoundment in accordance with the closure plan as approved by the Permit Board.

Nothing contained in the Order suggested that Mr. Redd was to be bound by the requirements of Part 265. The second body of evidence which supports the Respondent's argument is that in every State inspection, made of his facility following the 1983 Order, the State inspector's checklist, as to the requirements of Part 265 were marked N/A or Not Applicable. See Respondent's Exhibits Nos. 39, 40 and 41.

The Respondent further argues that 40 CFR § 265.228, in effect at the time of the inspection, demonstrates that the financial responsibility requirements were not applicable to him. That regulation provides that:

- (a) At closure, the owner or operator may elect to remove

from the impoundment;

- (1) Standing liquids;
- (2) Waste and waste residues;
- (3) The liner, if any; and
- (4) Underlying and surrounding contaminated soil.

- (b) If the owner or operator removes all the impoundment materials in paragraph (a) of this Section, or can demonstrate under § 261.3(c) and (d) of this Chapter that none of the materials listed in paragraph (a) of this Section remaining at any stage of removal are hazardous wastes, the impoundment is not further subject to the requirements of this Part.

Additionally, the aerial photo of the facility taken in August of 1985 shows that the ponds contained no visible contamination. The photos presented by the Agency, at the hearing, do not in my opinion show the presence of any visible contamination in the ponds. The Respondent, in arguing that no liability insurance was required, points to the language at p. 8 of the Agency's Brief which states that:

"Yet, had the Respondent been in compliance in all other respects, EPA may still have relieved him of the need to demonstrate financial responsibility."

This quote does not really support the Respondent's argument since the Brief goes on to discuss the other violations found at the facility.

When one considers this entire record, one is drawn to the inevitable conclusion that the State of Mississippi had in fact excused Mr. Redd from complying with the requirements of Part 265. Although EPA may not have been aware of this fact or approved of it had it known, it should have been on notice of the situation since 1983, four years prior to the inspection which gave rise to this action. Under the Act and the MOA, EPA is duty-bound to

oversee the actions of a State such as Mississippi which has been delegated the authority to administer RCRA. In this case they seem to have been lax in that duty. In making that statement, I do not mean to suggest that the State's action was wrong.

It was advised in 1983 that Mr. Redd intended to cease depositing waste in the two ponds and to clean-close them to avoid the costs of in situ closing which would have required the installation of a ground-water monitoring system ("GWMS") and the provision of insurance for a period of approximately 30 years. Given the nature of the clay, referred to as brick clay which is highly impermeable, in which the ponds were constructed, it appeared likely that clean-closure was entirely feasible, and such turned out to be the case. Since the Respondent was no longer operating the ponds as a waste treatment facility, it is reasonable not to require him to be bound by the requirements of Part 265.

It should also be noted that at the time of the inspection, the ponds were essentially in conformity with a closure plan submitted prior to the date upon which LOIS would occur. (See Complainant's Exhibit No. 14 which states that as of October 24, 1985, no wastes were on site and that Mr. Redd had removed 883.1 tons of waste and soil from the site.) A memorandum prepared by Bob Lee of the Mississippi authority stated that as of March 7, 1985, all sludge and contaminated soil has been removed from the Respondent's treatment plant. (See Respondent's Exhibit No. 8.) This memo also stated that the facility must "now wait on this office (The Mississippi authority) to provide further guidance RAM

before completing closure." (Emphasis supplied). This was two years prior to the subject EPA/Mississippi inspection.

By letter dated August 20, 1986, the Mississippi Agency advised Mr. Redd that the lower pond is clean-closed and may be backfilled with clean soils. As to the upper pond and serpentine channel, the Agency told Mr. Redd that he could remove an additional two feet of soil from them and provide topographical maps to demonstrate that this had been done. Mr. Redd elected to remove the soil and proceeded to do so. (See Respondent's Exhibit No. 17.)

By Order dated August 26, 1986, the MCNR approved the closure plan and gave the Respondent until March 30, 1987, to certify clean-closure. As indicated above, this date was changed due to excessive rainfall and the ponds were certified clean-closed on April 13, 1987, within the time extension granted by the State. The original closure plan was submitted on October 1, 1985, and yet it took the State almost a year to approve it. Mr. Redd, as above noted had already removed all visible waste by March of 1985 in anticipation of the State's ultimate approval of his closure plan.

The State is not without some blame in this matter concerning ultimate clean-closure. Had they operated in accordance with the time limits set forth in the regulations, it appears quite likely that the ponds would have been certified clean-closed well before the subject inspection. The testimony of Mr. Rollins cited above provides some insight into this situation. The readers's attention is directed to that testimony. In addition, Respondent's Exhibit

No. 43, which is a memo of a phone conversation between EPA's witness Hugh Hazen and Chuck Estes of the State Agency dated January 28, 1988 reveals that Mr. Estes said, as follows:

"So while Chuck does not agree that the company has certified closure, he feels that, at least, part of the reason for the delay was the State's fault."

He also was reported to have said that:

"....The State did not want to undermine our (EPA's) action but may have to consider taking some action to reflect the delay caused by the State."

I have no idea what that statement means.

So in view of all of the events surrounding Mr. Redd's attempt to expeditiously clean-close his waste ponds, I do not view the State's action in waiving the Part 265 requirements as to him to be unreasonable or contrary to law. Consequently, I will dismiss those portions of the Complaint which charge him with violations of Part 265 of the regulations.

The insurance issue is also not clear. My reading of the regulations would suggest that the financial insurance which Mr. Redd did not provide has to do with assuring that funds are available to complete clean-closure in conformity with the State approved closure plan and not with sudden or non-sudden accidents. (See Respondent's Exhibit No. 42, which is the March 9, 1983 Order of the MCNR.) The approved closure plan prepared by H.M. Rollins Wood Preserving Service Company, dated August 27, 1985, (See Complainant's Exhibit No. 14) states that the total cost of clean-closure was \$10,000. This type of insurance was not the kind that Mr. Redd stated he could not obtain, despite his "good faith"

efforts to do so. In that regard, it should be noted that these efforts were made in 1986 and that Agency's policy of considering "good faith" efforts as a factor to be considered in deciding whether or not to cite a facility to have such insurance, expired on November 8, 1985, that date when facilities either had to file a Part B application or cease using its facilities for waste handling, i.e. loss of interim status (LOIS). So in any event, the "good faith" effort defense was not available to Mr. Redd since his attempts were made after the cut-off date. (See U.S.A. v. T&S Brass and Bronze Works, Inc., Civil Action No. 6:87-1190-3, Jan. 27, 1988, U.S. District Court for the Greenville Division of South Carolina.)

Also as to the insurance issue, the Director of the EPA Region IV, Waste Management Division (RCRA) sent a letter dated January 9, 1986 to Mr. Jack McMillan, Director of the State's RCRA program, advising him that unless a facility could certify that it had closure and post-closure financial responsibility and sudden and non-sudden insurance in effect by November 8, 1985, it "must submit a closure-plan by November 23, 1985, and stop placing waste in the unit that failed to certify compliance." (See Complainant's Exhibit No. 16.) This is precisely what Mr. Redd did in a timely fashion. Therefore, in my opinion he did not have to obtain the liability insurance for the ponds. He was, however, required to comply with the financial responsibility requirements for closure which he failed to do. No post-closure care assurances were required, since the facility was to be clean-closed. Although not

offered into evidence, the State inspection report done in 1985 (Respondent's Exhibit No. 40) states that Mr. Redd did have a letter of credit for this purpose which expired on November 15, 1984. So at least he made some token effort to comply with the financial responsibility requirements.

As the record in this case reveals, Mr. Redd advised the MCNR in 1982 of his intention to cease using the ponds as a waste disposal facility. In 1983, after building his closed-loop treatment works, no longer placed any additional K001 waste in the ponds.

The State's actions in regard to Mr. Redd appear to be somewhat inconsistent. As I suggested above, the March 9, 1983 Order of the MCNR, in conjunction with other evidence, leads one to conclude that the MCNR had relieved him of meeting the requirements of Part 265. However, by Order dated May 23, 1986, the MCNR ordered Mr. Redd to obtain insurance for sudden and non-sudden accidents. (Complainant's Exhibit No. 18.) This Order was later rescinded. Further, by Order dated July 10, 1985, the MCNR ordered Mr. Redd to install a GWMS to assure clean-closure of his facility. (See Complainant's Exhibit No. 13.) Since one of the reasons an operator of a facility would elect to clean-close is to avoid the cost of installing such a system, the MCNR's Order seems to be at odds with the intent of the regulations. Clean-closure is demonstrated by soil testing and analysis which shows that no detectable hazardous waste constituents remain at the site of the ponds. If no waste is detected, following such removal, logic

would suggest that there could be no contamination of the groundwater under the ponds, since waste finding its way down to the uppermost aquifer would leave a trail of waste constituents reaching down to such aquifer. The wells were installed by the State Bureau of Geology at the request of the State RCRA authority. I suppose this was done as part of the RAM program.

By Order dated January 30, 1987, the MCNR noted that Mr. Redd had not yet obtained the liability insurance and fined him \$1,000 for such failure. It also ordered him to continue to make reasonable efforts to obtain such insurance and shall, in any event, comply with such requirements no later than the date he certifies clean-closure. This Order also flies in the face of logic and common sense since once clean-closure is certified the owner is no longer required to have such insurance. I see nothing in the Orders presented as evidence that mentions the insurance required to assure the availability of funds necessary to complete clean-closure as required by § 265.146. As noted, this cost was estimated to be \$10,000.

All of these Orders were issued in the face of knowledge that Mr. Redd told the MCNR in 1982 that he intended to clean-close, ceased using the ponds in 1983 and a memo from one of its own employees stating that as of March 7, 1985, all of the K001 sludge and contaminated soil had been removed from the ponds.

Although Mr. Redd is certainly not the Mother Theresa of the environment, one can certainly understand his confusion and frustration resulting from the actions of the MCNR.

THE PENALTY ISSUE

As stated above, the violations regarding Part 265 have been dismissed. The Agency did propose a penalty of \$300 for failure to certify closure. As the record demonstrates, the MCNR gave Mr. Redd until March 30, 1987, to certify closure and the inspection was done in February of 1987. The MCNR amended its March 30, 1987 date, due to heavy rainfall and extended the date till April 30, 1987. Clean-closure was certified on April 13, 1987, well within the date specified by the MCNR. So I do not feel that any penalty for this alleged violation is warranted.

For the failure to obtain liability insurance, the Agency proposed a penalty of \$27,000. As noted above, I am of the opinion that such insurance was not required and in calculating that figure the Agency added \$17,500 to the base penalty of \$10,000, as the economic benefit of non-compliance. The Agency decided that 8 million dollars of insurance was required at a premium of \$20,000 per million of insurance for a period of 75 days, i.e. from March 30, 1987 until June 13, 1987, on the notion that clean-closure could not be certified until 60 days from the date of the Respondent's letter of April 13, 1987. The Agency was obviously not aware that the MCNR had extended the closure date and that the State ordered that clean-closure had, in fact, been certified on April 13, 1987. Consequently, even if the insurance was required, the Agency penalized Mr. Redd in the amount of \$1,000 for failure to have such insurance, even though I am of the opinion that it was not needed. Although not cited in the Complaint, Mr. Redd did not

have, at the time of the inspection the financial responsibility assurances for closure costs as required by the regulations. However, since at the time of the inspection, the facility was essentially clean-closed and the cost of closure was estimated to be \$10,000, I feel that the \$1,000 fine paid by him for failure to have insurance he didn't need is sufficient to cover this violation.

As to the violation found above, concerning the improper placing of garbage bags full of K001 on pallets and the ground, the Agency suggested a base penalty of \$25,000, which included an upward adjustment of \$6,250 for history of non-compliance and a downward adjustment of \$6,250 for "good faith" efforts to comply, leaving a net penalty of \$25,000. The base penalty of \$25,000 was computed using the matrix found in the penalty policy based on major allocations both as to potential for harm and extent of deviation. (See Complainant's Exhibit No. 46.) I agree with that calculation and find it to be both appropriate and in accordance with the RCRA Penalty Policy.

Following the February 1987 joint inspection, the MCNR levied a \$5,000 fine against Mr. Redd for the same violation. The Agency acknowledges this State penalty and deducted \$5,000 from the \$80,050 penalty initially calculated. I will do the same and assess a penalty of \$20,000 for the violation concerning the bags of K001. The MCNR later, by Order dated September 28, 1987, (see Complainant's Exhibit No. 41) assessed a fine of \$1,250 against Mr. Redd for failure to abide by the conditions, contained in the

initial Order which fined him \$5,000. Since this fine was for a separate violation I do not feel that any credit for that penalty is due to Mr. Redd.

ORDER²

1. A civil penalty in the amount of \$20,000 is assessed against Respondent Gordon Redd, d/b/a/ Gordon Redd Lumber Company, for the violations of the Act and the regulations found herein.

2. Payment of the full amount of the civil penalty assessed shall be made, within 60 days of service of the Final Order upon Respondent, by forwarding a cashiers check or certified check payable to "Treasurer of the United States of America" to:

EPA - Region 4
(Regional Hearing Clerk)
P.O. Box 100142
Atlanta, GA 30384

3. The Respondent is further ordered to:

- A. Fully comply with the Order of the State Commission No. 1214-87 dated April 22, 1987.
- B. Cease using garbage bags for the storage of the K001 waste produced by its treatment systems and stored pending shipment to an off-site waste facility.
- C. Use drums or tanks for such storage. Such drums or tanks must have closable lids and be marked as containing hazardous wastes

Dated: 5/30/91



Thomas B. Yost
Administrative Law Judge

² In accordance with 40 CFR § 22.27(c), this Initial Decision will become the Final Order of the Administrator within 45 days after its service upon the parties unless (1) an appeal is taken by a party to the proceedings, or (2) the Administrator elects, sua sponte, to review the Initial Decision. 40 CFR § 22.30(a) provides that such appeal may be taken by filing a Notice of Appeal within twenty (20) days after service of this Decision.

CERTIFICATION OF SERVICE


I hereby certify that, in accordance with 40 C.F.R. § 22.27(a), I have this date hand delivered the Original of the foregoing INITIAL DECISION of Honorable Thomas B. Yost, Administrative Law Judge, to Ms. Julia Mooney, Regional Hearing Clerk, United States Environmental Protection Agency, Region IV, 345 Courtland Street, Atlanta, Georgia, and have referred said Regional Hearing Clerk to said Section which further provides that, after preparing and forwarding a copy of said INITIAL DECISION to all parties, she shall forward the original, along with the record of the proceeding, to:

Hearing Clerk (A-110)
EPA Headquarters
Washington, D.C.,

who shall forward a copy of said INITIAL DECISION TO THE to the Administrator.

Dated: _____

5/30/91



Jo Ann Brown
Secretary, Hon. Thomas B. Yost

CERTIFICATE OF SERVICE

91 JUN 3 P 1:2

I hereby certify that I have this day served a true and correct copy of the foregoing INITIAL DECISION in the matter of GORDON REDD LUMBER COMPANY, RCRA Docket No. 88-01-R, on each of the parties listed below in the manner indicated:

John Crawford, Esquire (via Certified Mail - Return Receipt
Butler, Snow, O'Mara, Requested)
Stevens & Cannada
17th Floor Deposit Guaranty Plaza
Jackson, Mississippi 39225

Zylpha K. Pryor, Esquire (via Hand-Delivery)
Associate Regional Counsel
U.S. Environmental Protection
Agency
345 Courtland Street, N.E.
Atlanta, Georgia 30365

I hereby further certify that I have caused the original of the foregoing INITIAL DECISION together with the record of the proceeding in the matter of GORDON REDD LUMBER COMPANY, RCRA Docket No. 88-01-R, to be delivered to the Headquarters Hearing Clerk addressed as follows (via inter-agency pouch mail).

Bessie L. Hammel
Headquarters Hearing Clerk
U.S. Environmental Protection
Agency (Mail Code A-110)
401 M Street, S.W.
Washington, D. C. 20460

Date: 5/31/91

Julia P. Mooney
Julia P. Mooney
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365
(404) 347-1565
FTS 257-1565