# IN RE GORDON REDD LUMBER COMPANY

RCRA (3008) Appeal No. 91-4

***FINAL ORDER***

Decided June 9, 1994

## Syllabus

U.S. EPA Region IV brought an administrative enforcement action against Gordon Redd ("GR") for RCRA violations allegedly occurring at GR's creosote wood treating facility located in Brookhaven, Mississippi. The State of Mississippi has an authorized RCRA program, but the Region is exercising its authority under section 3008 of RCRA, 42 U.S.C. § 6928, to bring its own enforcement action against GR for violations of Mississippi's RCRA regulations. In its Amended Complaint, the Region charged GR with 14 violations of 40 C.F.R. part 265 (interim status standards), relating to the use of two surface impoundments for the collection of creosote-contaminated wastewater. The Region also charged GR with violations related to the creation of a new hazardous waste management unit at the facility where bottom sediment sludge from creosote contaminated wastewater (K001 waste) was stored in plastic garbage bags. After an evidentiary hearing, the Presiding Officer dismissed the part of the Amended Complaint relating to the two surface impoundments but assessed a $20,000 penalty for the storage of K001 waste in garbage bags.

The Region appealed, raising the following specific issues: (1) whether the surface impoundments still contained contaminated soil as of February 18, 1987, making GR subject to the requirements of part 265 on that date; (2) whether the State of Mississippi excused GR from complying with the requirements of part 265; (3) whether facilities that lost interim status on November 8, 1985, submitted a closure plan, and ceased placing waste in the regulated unit were still required to comply with the financial responsibility requirements through certification of closure; (4) whether the April 13, 1987 letter submitted to the State by GR's engineer constitutes a valid certification of closure and if not whether GR was required to have liability insurance during the 75-day period beginning March 30, 1987; and (5) whether EPA's oversight of State action with regard to GR was inadequate and its subsequent enforcement action untimely and inappropriate, as concluded by the Presiding Officer.

GR also appealed, raising the following specific issues: (1) whether the storage of K001 solid waste in garbage bags at the site created a new "hazardous waste management facility" subject to the requirements of part 264 and section 270.10(f); (2) whether the Presiding Officer's penalty assessment for the violation of section 270.10(f) is disproportionate and inappropriate; and (3) whether EPA failed to give the State proper notice that it intended to bring an enforcement action, as required under section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2).

Held: (1) The Region fully complied with the section 3008(a)(2) notice requirement; (2) At the time of the February 18, 1987 inspection, the surface impoundments were not exempt from the requirements of part 265; (3) GR did not certify closure in the April 13, 1987

letter to the State, and was required to have liability insurance during the 75-day period beginning March 30, 1987; (4) The storage of garbage bags of K001 waste at the site created a new hazardous waste management unit without a permit in violation of section 270.10(f); (5) At the time of the February 18, 1987 inspection, the garbage bags of K001 waste were not exempt from the requirements of part 264; and (6) The Presiding Officer's gravity determination for the violation of section 270.10(f) was appropriate, but the Presiding Officer imposed a penalty for that violation different from that proposed by the Region without explaining his reasons for doing so. The Environmental Appeals Board is remanding this case so that a new Presiding Officer (the original one having retired) can: (1) determine whether GR committed the part 265 violations alleged in the amended complaint (other than the liability insurance violation) and render a decision based on that determination; (2) determine whether the penalty proposed in the amended complaint for the failure to obtain liability insurance is appropriate; (3) either bring the penalty determination for the violation of section 270.10(f) into line with the penalty proposed by the Region or explain his or her reasons for not doing so; and (4) determine whether GR committed the part 264 violations alleged in the complaint and render a decision based on that determination.

***Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.***

***Opinion of the Board by Judge McCallum:***

Before us is an appeal of an Initial Decision issued by Administrative Law Judge Thomas B. Yost (Presiding Officer) in this administrative enforcement action brought by U.S. EPA Region IV against Gordon Redd (an individual doing business as Gordon Redd Lumber Company) ("GR") for violations of the Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended, 42 U.S.C. §§ 6901-6992k. The alleged violations occurred at GR's creosote wood treating facility located in Brookhaven, Mississippi. The State of Mississippi has its own RCRA program and is "authorized to carry out such program in lieu of the Federal program * * *." RCRA § 3006, 42 U.S.C. § 6926(b). Nevertheless, because the Region is not satisfied with the State's enforcement actions against GR, the Region is exercising its authority under section 3008 of RCRA, 42 U.S.C. § 6928, to bring its own enforcement action against GR for violations of Mississippi's RCRA regulations. The violations charged in the Amended Complaint concern two separate activities at GR's creosote wood treating facility: its use of two surface impoundments for the collection of creosote-contaminated wastewater, and its storage of bottom sediment sludge from the wastewater (K001 waste) in plastic garbage bags. The bags were stored on wooden pallets in a clearing separate from the surface impoundments. The counts of the Amended Complaint relating to the surface impoundments charge GR with failing to comply with several requirements applicable to interim status facilities, i.e., requirements that facilities in existence prior to November 19, 1980, must satisfy prior to receiving a permit or while undergoing closure if they are not seeking a permit. The counts in the Amended Complaint relating to the storage of bottom sediment sludge in plastic garbage bags, on the other hand, charge

GR with creating a new hazardous waste management unit without first obtaining a permit. After an evidentiary hearing conducted from January 15, 1991 through January 17, 1991, the Presiding Officer issued an Initial Decision, dismissing the surface impoundment counts entirely but assessing a $20,000 penalty for the storage of the bottom sediment sludge in garbage bags. His Initial Decision nevertheless omitted reference to several counts pertaining to the latter activity. Both sides have appealed.

For the following reasons, we reverse the Presiding Officer's dismissal of the surface impoundment counts and remand those counts so that a new Presiding Officer (the original one having retired) can make certain factual findings and render a decision based on those findings. We uphold the Presiding Officer's liability determination relating to the garbage bags of K001 waste to the extent this issue is addressed in the Initial Decision, but we remand the case for a further determination of liability on the remaining counts that the Initial Decision did not address. In addition, we remand the penalty determination so that the new Presiding Officer can either bring the penalty into line with that proposed in the Amended Complaint or explain his or her reasons for not doing so.

## I. *BACKGROUND*

The wood treating process used at GR's facility generates creosote contaminated wastewater. From 1979, when the facility began operating, to some time in late 1983 or 1984, two surface impoundments and a serpentine channel at the facility were used to collect the contaminated wastewater. Sediment from the wastewater would settle on the bottom of the two surface impoundments. This bottom sediment sludge is listed at 40 C.F.R. § 261.32 as a hazardous waste (Industry and EPA hazardous waste No. K001).[1] By 1984, the facility had begun using sand filters and a treatment system to treat the contaminated wastewater and was no longer channeling the wastewater to the impoundments. The treated wastewater was sent instead to a local publicly owned sewage treatment facility.

[1] It should be noted that the parties and the Presiding Officer all refer to the federal regulations when citing what are in fact State regulations. *See, e.g.*, Amended Complaint at 2. We adopt the same practice. Therefore, references in this opinion to parts 124, 261, 262, 264, 265, and 270 of title 40 of the Code of Federal Regulations (C.F.R.) should be understood as referring instead to the corresponding provisions of Mississippi's authorized RCRA program, which incorporates by reference all of the pertinent federal RCRA regulations.

In 1984, Congress amended RCRA to add section 3005(e), the "Loss of Interim Status" ("LOIS") provision.[2] This provision provides that an existing hazardous waste land disposal facility would automatically lose interim status on November 8, 1985, unless before that date the facility submitted a part B application and certified that it was in compliance with all applicable groundwater monitoring and financial responsibility requirements. Once a facility loses its interim status, it is required to cease operating its land disposal facility and begin the process of closing the facility. GR's facility became subject to the closure requirement on the prescribed date when it automatically lost its interim status by operation of the LOIS provision. GR submitted a closure plan in advance of the November deadline (Complainant's Exhibit 14), which the Mississippi Commission on Natural Resources (the "Commission") eventually approved by Order dated August 26, 1986 (Order No. 1082-1086). The Order required GR to submit a certification of closure in accordance with the closure plan by March 30, 1987. Complainant's Exhibit 23.

After a facility loses interim status, it is still required to comply with the applicable interim status requirements of part 265 until all closure and post-closure obligations have been satisfied. *See infra* n.21. On February 18, 1987, EPA and State personnel conducted an inspection of the facility and discovered what they believed were numerous violations of part 265 associated with the surface impoundments. The inspectors also discovered that K001 sludge collected from the sand filters had been placed in plastic garbage bags and taken down a path through a wooded area to a clearing in the woods about four hundred yards from the main operations. There, approximately 150 garbage bags full of sludge had been placed on wooden pallets. Several of the garbage bags had disintegrated, leaving standing piles of K001 waste on the ground, and other bags were ruptured and leaking.

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[2] Section § 3005(e)(2) of RCRA, provides as follows:

> In the case of each land disposal facility which has been granted interim status under this subsection before November 8, 1984 interim status shall terminate on the date twelve months after November 8, 1984 unless the owner or operator of such facility—
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> > (A) applies for a final determination regarding the issuance of a permit under subsection (c) of this section for such facility before the date twelve months after November 8, 1984; and
> >
> > (B) certifies that such facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

42 U.S.C. § 6925(e)(2). This statutory provision is implemented in the regulations at 40 C.F.R. § 270.73(c).

In response to the February 18, 1987 inspection, the Commission issued an Order dated April 22, 1987 to GR, assessing a $5,000 penalty for violations relating to the storage of K001 waste in garbage bags at the site. Complainant's Exhibit 35. The Order specifically charged GR with violations of 40 C.F.R. § 270.10(f) (requiring a new facility to obtain a RCRA permit before construction), § 265.73 (keeping an operating record), § 265.74 (availability, retention, and disposition of records); § 265.171 (condition of containers), and § 265.173 (management of containers). The Order did not mention any violations relating to the surface impoundments.

After reviewing the State's April 22, 1987 Order and penalty calculations, the Region determined that the State's action was inadequate. Consequently, on July 31, 1987, the Region notified the State of its intent to bring its own enforcement action ("to overfile") charging GR with numerous part 265 violations relating to the surface impoundments as well as the violation of 40 C.F.R. § 270.10(f) relating to the operation of a hazardous waste management unit (*i.e.*, the area where garbage bags of K001 waste were stored) without a permit. Complainant's Exhibit 37.[3]

After the Agency had sent State officials its notice of intent to overfile, the Commission issued an additional order on September 28, 1987, assessing a penalty of $1250 against GR for failure to meet certain dates for sampling and analysis set forth in the Commission's April 22, 1987 Order. Complainant's Exhibit 41. The September 28, 1987 Order also states that the April 22, 1987 Order and the $5000 penalty imposed therein applied to all of the RCRA violations discovered dur-

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[3] The Region's notice states in pertinent part that:

> EPA has received and reviewed the Commission Order issued to this facility on April 22, 1987. EPA intends to overfile in this case because we feel the order failed to address several important issues. Specifically, no penalty was assessed for operation of a hazardous waste management unit without a permit or interim status (40 C.F.R. 270.70(10)), even though this violation was cited in the order. The order did not cite the following violations:
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> 265.13 - Waste analysis plan
> 265.14 - Security
> 265.15 - Inspection schedule or records
> 265.16 - Personnel training records
> 265.31 - Operation of facility
> 265.32 and 265.33 - No safety equipment
> 265.37 - Arrangement with local authorities
> 265.53 and 265.56 - No contingency plan
> 265.112 - Closure plan
> 265.174 - No inspection logs for containers

Complainant's Exhibit 37.

ing the February 18, 1987 inspection of GR's facility, not just the storage violations relating to the garbage bags specifically mentioned in the April 22, 1987 Order.

The Agency was apparently not satisfied with the State's September 28, 1987 Order either and proceeded to file the enforcement action that was the subject of its July 31, 1987 notice of intent to overfile. In response, GR filed a motion to dismiss on the ground that the Complaint listed GR as a corporation, when in fact GR is an individual doing business as the Gordon Redd Lumber Company. The Region then filed an Amended Complaint on March 18, 1988, identifying GR as an individual and making other minor changes in the original Complaint. The Amended Complaint charged GR with violations of all five of the regulations mentioned in the Commission's April 22, 1987 Order plus violations of 35 other regulations not mentioned in the Commission's Order.[4]

In addition to the foregoing violations discovered during the February 18, 1987 inspection, the Amended Complaint also charged GR with a 75-day violation of section 265.147, which requires the owner/

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[4] In the Amended Complaint, GR is charged with the following violations: (1) Failure to have a waste analysis plan or records available on-site as required by 40 C.F.R. §§ 264.13 and 265.13; (2) Failure to make provisions to prevent unknowing entry, and to minimize the possibility of an unauthorized entry into the active portion of the facility, as required by 40 C.F.R. §§ 264.14 and 265.14; (3) Failure to have an inspection schedule or inspection records available as required by 40 C.F.R. §§ 264.15 and 265.15; (4) Failure to have personnel training records available on site as required by 40 C.F.R. §§ 264.16 and 265.16; (5) Failure to maintain and operate the facility so as to minimize the possibility of release of hazardous waste constituents to the environment as required by 40 C.F.R. §§ 264.31 and 265.31; (6) Failure to provide evidence that safety equipment was present and/or maintained on-site as required by 40 C.F.R. §§ 264.32, 264.33, 265.32, and 265.33; (7) Failure to provide evidence that any arrangements had been made with local or state emergency authorities as required by 40 C.F.R. §§ 264.37 and 265.37; (8) Failure to have a contingency plan available on-site as required by 40 C.F.R. §§ 264.53 and 265.53; (9) Failure to have evidence that an employee had been identified as the emergency coordinator, as required by 40 C.F.R. §§ 264.52, 264.55, 265.52, and 265.55; (10) Failure to have operating records on-site as required by 40 C.F.R. §§ 264.73, 264.74, 265.73, and 265.74; (11) Failure to have and maintain financial responsibility for bodily injury and property damage to third parties caused by sudden (for both surface impoundments and waste piles/storage areas) or non-sudden (for surface impoundments only) accidental occurrences arising from the operation of the facility or group of facilities, as required by 40 C.F.R. §§ 264.147(a) and 265.147(a). With regard to the garbage bags of K001 only, GR is charged with the following violations: (1) Failure to comply with the permit application requirements for a new hazardous waste management facility as required by 40 C.F.R. § 270.10(f); (2) Failure to properly use, manage, inspect, and provide a containment system for containers of hazardous waste as required by 40 C.F.R. §§ 264.171, 264.173, 264.174, and 264.175 (3) Failure to institute a detection monitoring program under 40 C.F.R. §§ 264.91 and 264.98; (4) Failure to have a closure plan for the waste piles/container storage area as required by 40 C.F.R. § 264.112; (5) Failure to develop a cost estimate and establish financial assurance for closure as required by 40 C.F.R. §§ 264.142, 264.143; (6) Failure to meet the design and operational requirements, and monitoring and inspection requirements, for waste piles as specified in 40 C.F.R. §§ 264.251 and 264.254.

operator of the facility to maintain liability insurance until closure of the facility (*see infra* n.25). This violation allegedly began on March 30, 1987, after the inspection. This violation and several others charged in the Amended Complaint were not mentioned in the Region's notice of intent to overfile. The Amended Complaint, like the original Complaint, proposed a penalty of $75,000, of which $59,700 is for violations pertaining to the surface impoundments, and the remaining $15,300 is for construction and operation of a new hazardous waste management unit (the garbage bags) without a permit.

As noted earlier, following a three-day hearing, the Presiding Officer concluded that the storage of plastic garbage bags of K001 waste at the site created a new hazardous waste management facility without a permit in violation of section 270.10(f), for which he assessed a penalty of $20,000. The Presiding Officer dismissed the counts in the Amended Complaint relating to the two surface impoundments on the ground that the State had excused GR from compliance with the part 265 requirements.[5] The Presiding Officer also separately dismissed the count of the Amended Complaint relating to the liability insurance requirement of section 265.147, concluding that GR was not required to obtain such insurance because it had ceased placing waste in the surface impoundments and had submitted a closure plan.

The Region has appealed the Presiding Officer's dismissal of the surface impoundment counts, raising the following specific issues: (1) whether the facility still contained contaminated soil as of February 18, 1987, making GR subject to the requirements of part 265 on that date; (2) whether the State of Mississippi excused GR from complying with the requirements of part 265; (3) whether the facility, which lost interim status on November 8, 1985, submitted a closure plan, and ceased placing waste in the regulated unit, was still required to comply with the financial responsibility requirements through certification of closure; (4) whether a document must satisfy the requirements of 40 C.F.R. § 265.115 to constitute a valid certification of closure; and (5) whether EPA's oversight of State action with regard to GR was inadequate and its subsequent enforcement action untimely and inappropriate, as concluded by the Presiding Officer.

GR has appealed the Presiding Officer's rulings pertaining to the garbage bags, raising the following specific issues: (1) whether the storage of K001 solid waste in garbage bags at the site created a new "hazardous waste management facility" subject to the requirements of part 264

[5] The Presiding Officer concluded that the State had excused GR from compliance with such requirements in 1983, when it issued an order specifying actions GR was required to take to accomplish clean closure of the surface impoundments.

and section 270.10(f); (2) whether the Presiding Officer's penalty assessment for the violation of section 270.10(f) is disproportionate and inappropriate; and (3) whether EPA failed to give the State proper notice that it intended to bring an enforcement action, as required under section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2).

## **II.** *DISCUSSION*

In the discussion below, we first address GR's potentially threshold argument that the Region's notice of intention to overfile was inadequate and that, consequently, the Region did not have authority to bring this enforcement action (the third issue raised by GR). We next consider whether, at the time of the February 18, 1987 inspection, GR was exempt from the part 265 interim status requirements either because the State had excused it from compliance or because it had removed all contamination from the surface impoundments before that date (consolidating the five issues raised by the Region). We then turn to consider whether the placement of garbage bags full of K001 waste in the clearing in the woods created a new hazardous waste management facility subject to section 270.10(f) and the requirements of part 264 (the first issue raised by GR). Finally, we determine whether the penalty imposed by the Presiding Officer for the storage of garbage bags of K001 waste is appropriate (the second issue raised by GR).

### A. *Notice of Overfiling*

Mississippi is authorized to carry out a hazardous waste program under section 3006 of RCRA, 42 U.S.C. § 6926, in lieu of the federal program. Nevertheless, under the statute, even if the State brings an enforcement action for violations of the State's program, the Agency retains authority to bring its own enforcement action for such violations. RCRA § 3008(a), 42 U.S.C. 6928(a); *E.P.A. v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172, 1186 (N.D. Ind. 1989), *aff'd* 917 F.2d 327 (7th Cir. 1990), *cert. denied* 499 U.S. 975 (1991). The sole statutory restriction on this authority is that the Agency, before filing its own action ("overfiling"), must first notify the State of its intention to overfile. *Id.* This notice requirement appears at section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2), which provides as follows:

> (2) In the case of a violation of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 of this title, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

On appeal, GR argues that the Region's notice of overfiling in this case is inadequate, and that the Region therefore has no authority to bring this enforcement action, because: (1) the Amended Complaint did not allege that notice of overfiling had been sent to the State; (2) the Region should have given the State a second notice before bringing an enforcement action, because the State filed its own enforcement action after it received EPA's notice of intent but before EPA filed its enforcement action;[6] (3) the notice did not identify GR's failure to obtain liability insurance as one of the violations that the Region would enforce in its overfiling. For the following reasons, we reject these arguments.[7]

As to the first argument, we do not believe that it was necessary under the rules governing this administrative proceeding for the complaint itself to include a specific allegation explaining that prior notice under 3008(a)(2) was given to the State. By arguing to the contrary GR appears to be drawing an analogy to the Federal Rules of Civil Procedure, which require plaintiffs to plead the factual basis of the Court's jurisdiction in their complaints: "[a] pleading * * * should contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends * * *." Fed. R. Civ. P. 8.[8] The Federal Rules of Civil Procedure, however, do not dictate the contents of an administrative complaint filed under the Consolidated Rules at 40 C.F.R. part 22.[9] Instead, section 22.14 of the Consolidated Rules provides, in pertinent part, that the Complaint shall include: "A statement reciting the section(s) of the Act authorizing the issuance of the complaint." 40

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[6] As noted earlier, after the Agency had sent State officials its notice of intent to overfile, the Commission issued an additional order on September 28, 1987, assessing a penalty against GR for failure to meet certain dates for sampling and analysis set forth in the Commission's April 22, 1987 Order.

[7] The Region argues that the purpose of the notice requirement is not to benefit the respondent but to "foster a good working relationship between the Agency and the State." The Region argues, therefore, that "the statutory requirement that EPA give notice to the State does not give rise to a defense which may be raised by private party respondents." Region's Supplemental Brief at 4. We need not decide, however, whether the failure to satisfy the notice requirements of section 3008(a)(2) gives rise to a defense, because we conclude that the Region did satisfy section 3008(a)(2).

[8] For the reasons identified in the text accompanying this footnote, we also do not believe that a judicial (as opposed to administrative) complaint would need to allege compliance with section 3008(a)(2) to establish jurisdiction either.

[9] Although the experience of federal courts in applying the Federal Rules of Civil Procedure can in some cases offer an instructive example, those rules are not applicable to Agency proceedings conducted under Part 22. *See In re Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3, at 10 n.20 (EAB, October 6, 1993); *In re Detroit Plastic Molding Co.*, TSCA Appeal No. 87-7, at 7 (CJO, March 1, 1990).

C.F.R. § 22.14(a)(1). In this case the Amended Complaint filed against GR contains the following reference to the complaint's statutory authority: "This Amended Complaint and Compliance Order is filed pursuant to section 3008(a)(1) of the Solid Waste Disposal Act * * *." For the following reasons, we conclude that the amended complaint, by referencing section 3008(a)(1), fully satisfies the pleading requirement at section 22.14(a)(1) and need not be dismissed simply because it does not allege that the Region gave notice to the State under section 3008(a)(2).

Section 3008(a)(1) provides as follows:

> Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

42 U.S.C. § 6928. The phrase "requirement of this Subchapter" in the above-quoted section includes the requirements of an approved State program.[10] As can readily be seen, the authority conferred by this section is broad and without express limitation on the State jurisdictions where it can be exercised. Thus, by itself, section 3008(a)(1) provides sufficient authorization for the Agency to file complaints in any State, even authorized States.

By contrast, section 3008(a)(2) merely serves to ensure that the States receive appropriate notification of impending federal enforcement actions. It effectively enshrines comity as a guiding principle in EPA's enforcement dealings with authorized States. However, it does not in itself provide authorization for federal enforcement actions. As the U.S. Court of Appeals for the Ninth Circuit has observed:

> [Section 3008(a)(2)] simply conditions the exercise of such authority on the provision of prior notice. In other

[10] That the requirement of an approved State program is included within the phrase "any requirement of this Subchapter" is confirmed by section 3008(a)(2), which refers to "a violation of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926." 42 U.S.C. § 6928(a)(2).

> words, were section (a)(2) to be eliminated from the Act, the apparent effect would not be to withdraw federal authority under section 3008 wherever authorized state programs were in effect; rather it would be to free federal section 3008 authority of the notice requirement.

*Wyckoff Co. v. EPA*, 796 F.2d 1197, 1201 (9th Cir. 1986). Accordingly, there is no legal obligation on the Agency to cite this section of the Act when filing a complaint in an authorized State, since under the Consolidated Rules section 3008(a)(2) is not a "section[ ] of the Act authorizing the issuance of the complaint." 40 C.F.R. § 22.14(a)(1). Thus, the Amended Complaint satisfies the pleading requirements of the Consolidated Rules and does not need to be dismissed simply because the Region did not include an allegation that it gave notice to the State of its intent to file the complaint.

Next, GR contends that the Amended complaint should be dismissed because the Region did not give the State a second notice under section 3008(a)(2) before bringing an enforcement action. GR believes a second notice was required because after the State received EPA's notice of intent but before EPA filed its enforcement action, the State filed its own enforcement action.[11] By failing to give such second notice, GR argues, the Region frustrated the Congressional purpose of the notice requirement, which is "to give deference to authorized states to pursue enforcement of hazardous wastes laws."[12] GR believes that, under these circumstances, even if the original notice was not subject to question at the time it was given, a second notice is nevertheless required so that the State would know why its enforcement efforts were still inadequate. The State could then decide whether to revise its previous enforcement response to address the additional deficiencies identified by the Agency in the second notice.

We are not persuaded by this analysis. Neither the language nor the purpose of section 3008(a)(2) requires that a second notice be given in these circumstances. First, there is simply nothing in the language of section 3008(a)(2) to support GR's position. Section 3008(a)(2) requires the Region to give notice prior to filing its enforcement ac-

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[11] *See supra* n.6.

[12] Supplemental Brief of Appellee/Cross-Appellant Gordon Redd Lumber Company at 2 (quoting *In re Landfill, Inc.*, RCRA (3008) Appeal No. 86-8, at 6, n.5 (CJO, November 24, 1989)).

tion, and that is exactly what the Region did. There can be no question that the Region satisfied the letter of section 3008(a)(2).[13]

Nor does the purpose of that section require that a second notice be given. We agree with GR that the purpose of the notice requirement is to promote a relationship of federal/State comity or "partnership" in which EPA shows "deference" to the State as the primary enforcement authority of the State's RCRA program. Supplemental Brief of Appellee/Cross-Appellant Gordon Redd Lumber Company at 2-4 (citing *In re Landfill, Inc.*, RCRA (3008) Appeal No. 86-8, at 6, n.5 (CJO, November 24, 1989)).[14] We disagree, however, with GR's narrow conception of how such a relationship can be promoted. GR believes that the only way for the Region to promote federal/State comity is to give the authorized State what is in essence a "right of first refusal" before EPA can proceed with its own enforcement action against a violator. In other words, only if the State refuses to proceed with its own enforcement action will EPA be allowed to proceed with its own. For the notice requirement to function properly, therefore, GR believes that the State must receive sufficient advance notice from EPA to allow it to decide whether and how it wants to proceed against the person who is the subject of the notice. If the State then proceeds to bring an enforcement action and EPA is still not satisfied, a second notice must be given explaining why EPA is not satisfied. Only in this manner can the purpose of promoting federal/State comity be fulfilled, according to GR.

This narrow conception of federal/State cooperation, however, cannot be reconciled with the notice requirement itself. A key feature of the notice requirement is that it does not specify a waiting period before the Region may file its enforcement action.[15] Thus, the Region

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[13] *See Environmental Waste Control, Inc., supra*, at 1186 ("The sole restriction on [EPA's overfiling] authority is that the EPA must notify the state before commencing any action."); *United States v. Conservation Chemical Company of Illinois*, 660 F. Supp. 1236, 1239 (N.D. Ind. 1987) (same); *In re Martin Electronics, Inc.*, RCRA (3008) Appeal No. 86-1, at 4-7 (CJO, June 22, 1987) (section 3008(a)(2) does not prevent the Agency from overfiling even if prior State enforcement actions are reasonable and appropriate, although as a matter of policy, EPA will not bring its own enforcement action if EPA believes that the State's enforcement action was appropriate and reasonable).

[14] *See United States v. Conservation Chemical Company of Illinois*, 660 F. Supp. 1236, 1245 (N.D. Ind. 1987)("[T]he legislative history [of section 3008(a)(2)] underscores the need for state and federal cooperation in implementing hazardous waste laws.").

[15] Prior to 1980, section 3008(a)(1) & 3008(a)(2) required EPA to give the State and the violator 30 days advance notice of its intent to file an enforcement action against the violator. *See* H.R. Rep. No. 1491, 94th Cong., 2nd Sess. 31 (1976). If the violator cured the alleged violation within that period, EPA would be barred from filing the action. *Id.* There was nothing, however, to bar the State from bringing its own enforcement action for past violations in such circumstances. The 1980 amendments to the Act eliminated the 30-day notice requirement, both as to the State and the violator. *See* S. Rep. No. 172, 96th Cong., 2nd Sess., 3-4 (1980).

can satisfy the requirement by giving notice to an affected State just hours, or even moments, before filing an action against the violator. If the Region satisfies the requirement in this manner, there is simply no time available for the State to prepare its own independent enforcement action against the violator. Given this feature of the notice requirement, it is clear that giving the State enough time to prepare its own enforcement action is not essential to the purpose of the notice requirement (*i.e.*, promoting federal/State comity). In addition, other methods of fulfilling that purpose are available. A good example, in our view, is EPA's practice of negotiating "memoranda of understanding," with individual authorized States. These documents spell out, according to the specific needs of the individual State, the procedures that the parties are expected to follow in circumstances where section 3008(a)(2) is applicable.[16]

Accordingly, we conclude that neither the language nor the purpose of section 3008(a)(2) requires the Region to send a fresh notice before filing a complaint against GR, simply because the State took an enforcement action in response to the Region's original notice.[17]

GR also argues that the Region's notice of intent did not fully satisfy section 3008(a)(2) because it did not identify every violation to be charged in the Agency's Amended Complaint. Specifically, GR points out that the Region's notice of intent did not identify GR's failure to obtain liability insurance, which was one of the violations alleged in the Amended Complaint. GR contends, therefore, that the notice was not effective as to that particular violation and that the count of the Amended Complaint relating to that violation must be dismissed. We disagree, for we do not believe that a strict correspondence between the notice and the complaint is necessary under the terms of the statute or to accomplish the purpose of giving notice to the State.[18]

As to the terms of the statute, section 3008(a)(2) provides that "the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under

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[16] *See* Transcript at 178-179.

[17] It should be noted that when the State received EPA's notice in this case, it chose not to implement the same enforcement action as that proposed by EPA. Instead, the Commission's September 28, 1987 Order focuses only on GR's failure to meet certain dates for sampling and analysis set forth in the Commission's April 22, 1987 Order. Complainant's Exhibit 41. The Commission's September 28, 1987 Order does not cover any of the regulatory violations specified in the Region's notice of intent to overfile. Under the circumstances, sending a second notice would serve no purpose.

[18] At the request of the Board, the parties submitted supplemental briefs on this issue.

this section." Although this sentence does not describe the content of the notice, it is clear from the structure of the sentence that the Region is required to give notice of the fact that it intends to bring an enforcement action. The sentence does *not* specify, however, that the notice must identify the violations to be charged in the enforcement action. This contrasts with the citizens suit provision at section 7002(b) of RCRA, 42 U.S.C. § 6972(b), where the language is more specific, stating that the person who intends to bring the suit must first give 60 days advance "notice *of the violation*" to the Administrator, the State and the alleged violator. (Emphasis added.) Similarly, other provisions of RCRA call for more specificity when deemed necessary by Congress.[19] Thus, if Congress wanted to require notice of the violation to be charged in an enforcement action, it knew how to do so and did so expressly. The fact that Congress did not use the same language in section 3008(a)(2), therefore, suggests that it did not intend to require the same level of detail. "[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *City of Chicago v. Environmental Defense Fund*, 62 U.S.L.W. 4283 (U.S., May 3, 1994)(No. 92-1639)(quoting *Keene Corp. v. United States*, 508 U.S. ____, ____, (1993)(slip. op., at 7-8)(internal quotation marks omitted)).

Nor is that level of detail required by the purpose of the notice requirement. As discussed above, the purpose of the notice requirement is to promote comity between the Agency and authorized States in the implementation of RCRA. *See supra* n.14. If that purpose could only be achieved by giving the State enough time to decide whether to bring its own enforcement action, then perhaps the State would need notice of each violation to be charged in the complaint. As we have concluded above, however, giving the State enough time to bring its own enforcement action is not the only way of fulfilling the purpose of promoting federal/State comity. Accordingly, we are not convinced that the purpose of the notice requirement can only be served by giving the State advance notice of every violation to be charged in the complaint. Rather, we believe that if, as is the case here, the notice enables the State to discern with reasonable certainty who is being charged with misconduct, where the misconduct took place, and what type of activities gave rise to the misconduct, the State will be accorded the dignity and stature to which it is entitled under the Act, thus fully serving the purpose of the notice requirememt. Omitting reference in the notice to violations of a few specific regulations poses

[19] *See* RCRA § 3006(e), 42 U.S.C. 6926(e) (before Administrator may withdraw an authorized State program, he or she must first give notice in writing of "the reasons for such withdrawal."); RCRA § 3017, 42 U.S.C. § 6938 (requiring a high level of detail in the notice that a person must give to the Administrator before exporting hazardous waste).

no substantial threat to the doctrine of comity that underlies the statutory notice requirement. In this case the notice given by the Region easily fulfilled the purpose of the notice requirement by identifying the person who was the subject of the enforcement action and the facility where the violations allegedly occurred, by describing the activities that gave rise to the violations (*i.e.*, storage of hazardous waste in the surface impoundments and the storage of waste in the garbage bags), and by listing most of the specific regulations that GR would ultimately be charged with violating in the enforcement action.

We recognize that a Region may agree to provide greater detail in a memorandum of agreement with a State.[20] Nevertheless, for the reasons given above, we do not believe that the statute requires more than what was provided in this instance. We conclude, therefore, that the Region's notice to the State satisfied the requirements of section 3008(a)(2) even though there was not a perfect one-to-one correspondence between the notice's violations and those listed in the complaint.

B. *Applicability of Part 265 Interim Status Requirements*

The following section deals with the applicability of the part 265 interim status requirements to the surface impoundments. Specifically, we consider whether, at the time of the February 18, 1987 inspection, GR was exempt from those regulations either because the State had excused it from compliance or because it had removed all contamination from the surface impoundments before that date.

*Excuse from Compliance with Part 265*: After a facility loses interim status, it is still required to comply with the applicable interim status requirements of part 265 until all closure and post-closure obligations have been satisfied.[21] The Amended Complaint charges GR

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[20] The Memorandum of Agreement between the Agency and the State in effect at the time the action was commenced provided that notice to the State "shall set forth in detail the reasons that EPA has concluded that the state has not taken timely and appropriate action." Transcript at 178-179. The Agreement appears to require a level of detail not called for in the statute. But even if the Region's notice did not comply with this Agreement (a question on which we take no position), GR may not raise the Region's failure to comply with the Agreement as a defense against this enforcement action. GR is not an intended beneficiary of the of Agreement; the purpose of the Agreement is to govern the relationship between two sovereigns. Moreover, compliance with the Agreement is not a condition precedent on the Region's authority to bring an enforcement action. To the extent that the Agreement requires a greater level of detail than the statute, therefore, the Region's failure to comply with the Agreement has no effect on the Region's statutory authority to bring the action.

[21] Section 265.1(b), governing the applicability of the Part 265 requirements, provides as follows:

> The standards of this part apply to owners and operators of facilities that treat, store or dispose of hazardous waste who have fully complied with the requirements for interim status under

Continued

with violations of numerous requirements in subparts B, C, D, and E of part 265. *See supra* n.4. GR argues, and the Presiding Officer concluded, however, that the Commission had excused GR from compliance with such requirements in 1983 when it issued an Order (No. 606-83), dated March 9, 1983, specifying actions GR was required to take to accomplish clean closure of the surface impoundments. Respondent's Exhibit 42. Accordingly, the Presiding Officer dismissed those sections of the Amended Complaint charging GR with failure to comply with such requirements. The Region now challenges this holding, arguing that the State never excused GR from compliance with the requirements of part 265. For the following two reasons, we reverse the Presiding Officer's dismissal of these counts of the Amended Complaint.

First, we note that the Presiding Officer assumed and the Region seems to accept that if the State did excuse GR from compliance with part 265 requirements, the Region would not have authority to bring this enforcement action. It is not immediately obvious to us, however, that such an action by the State would prevent the Region from overfiling. To say that the State "excused" GR from compliance with the requirements of part 265 is just another way of saying that the State communicated to GR that it would, as a matter of enforcement discretion, refrain from bringing an enforcement action if GR violated a part 265 requirement. But a State's exercise of its enforcement discretion is certainly not binding on the Region. Indeed, EPA's statutory right to overfile is founded on the notion that EPA is entitled to bring enforce-

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> section 3005(e) of RCRA and § 270.10 of this chapter until either a permit is issued under section 3005 of RCRA or until applicable part 265 closure and post-closure responsibilities are fulfilled, and to those owners and operators of facilities in existence on November 19, 1980 who have failed to provide timely notification as required by section 3010(a) of RCRA and/or failed to file part A of the permit application as required by 40 C.F.R. 270.10 (e) and (g).

40 C.F.R. § 265.1(b). This section makes the requirements of part 265 applicable not only to facilities that currently have interim status, but also to facilities that have lost interim status. This conclusion was expressed in the preamble to the Federal Register notice amending section 265.1 as follows:

> EPA believes that it has both the statutory and regulatory authority to apply the Part 265 standards to those facilities whose interim status has been terminated. However, in order to clarify the Part 265 standards, the Agency is amending Section 265.1 to state specifically that the Part 265 requirements apply to an interim status facility until either a permit is issued under Section 3005 of RCRA or until all applicable Part 265 closure and post-closure responsibilities are fulfilled.

49 Fed. Reg. 46,094 (November 21, 1984).

ment actions in an authorized State whenever the State, in EPA's opinion, has not exercised its enforcement discretion properly. Accordingly, GR's defense that the State "excused" GR from compliance with the requirements of part 265 does not bar the Region from bringing its own action to enforce these requirements.

Second, we agree with the Region that the State did *not* excuse GR from compliance with the part 265 requirements. In the March 9, 1983 Order relied on by the Presiding Officer, the Commission first explains that GR had expressed its intent to eliminate all contamination from the facility. It then sets out a schedule directing GR to take certain actions by specified dates to accomplish closure of the facility. The Presiding Officer states that "[a]lthough this Order does not specifically excuse [GR] from complying with part 265, it seems to do so by implication." Initial Decision at 14. The Presiding Officer does not explain this conclusion, except to say that "[n]othing contained in the Order suggested that Mr. Redd was to be bound by the requirements of Part 265." *Id.* at 15. We believe that the Presiding Officer has misconstrued the March 9, 1983 Order. The Order does not purport to be a complete statement of all the requirements applicable to the facility. Rather, the Order focuses on what GR must do to "clean close" the surface impoundments. It simply cannot be read as excusing GR from complying with part 265 either expressly or by implication. This conclusion is confirmed by the State's subsequent actions. For example, by Order No. 88-85 the State imposed a $5,000 penalty against GR for not complying with section 265.92 (requiring groundwater sampling and analysis).[22]

For all the foregoing reasons, we conclude that the State did not excuse GR from complying with the requirements of part 265.

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[22] The Presiding Officer also relied on a series of inspection checklists prepared by State officials during inspections of GR's facility after the 1983 order was issued. Respondent's Exhibits 39, 40, 41. The boxes on these checklists for most part 265 requirements are marked "N/A" or "Not Applicable." The boxes for certain part 265 requirements relating to closure, however, were filled in. The Presiding Officer concluded that, because the boxes for most of the part 265 requirements were marked "Not Applicable," the State must have excused GR from compliance with such requirements. In our view, however, an equally plausible interpretation is that the purpose of the inspectors' visits was not to conduct full interim status compliance inspections, but only to check on GR's progress in achieving closure. *See* Transcript at 634-35 (testimony of Hugh Hazen). The Presiding Officer also relied on the following testimony of GR's consulting engineer, Mr. Rollins: "I was convinced based upon my conversations with the people in the State of Mississippi and the lack of any compliance actions against Gordon Redd, and my discussions with them, that they considered him to have a waiver [from Part 265]." Transcript at 1099. It is clear from Mr. Rollins' testimony, however, that no State official ever told Mr. Rollins directly that GR had been excused from complying with those requirements of part 265. Instead, Mr. Rollins drew an inference to that effect from the words and behavior of unspecified State officials. It is impossible to tell from his testimony, however, whether this inference has any basis in fact. We therefore accord little weight to Mr. Rollins' testimony.

*Section 265.228 Exemption*: In his Initial Decision, the Presiding Officer concluded that, at the time of the February 1987 inspection, GR was exempt from part 265 requirements by reason of section 265.228, which governs closure and post-closure of impoundments. At the time of the inspection, section 265.228 provided as follows:

> (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) or (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.

40 C.F.R. § 265.228 (1987).[23] For the following reasons, however, we conclude that the exemption in section 265.228 did not apply to the surface impoundments at the time of the February 18, 1987 inspection.

In support of his conclusion, the Presiding Officer relied on some overhead photographs of the site:

> 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.

Initial Decision at 16. This observation, however, cannot by itself support the conclusion that section 265.228 applies. Section 265.228 only applies if underlying and surrounding contaminated soil (*i.e.*, non-visible contamination) is removed, and the photographs do not show whether such non-visible contamination had been removed.

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[23] On March 19, 1987, the Agency amended section 265.228, removing the exemption. 52 Fed. Reg. 8708 (March 19, 1987).

Several documents in the record indicate that the surface impoundments were still contaminated at the time of the February 18, 1987 inspection. By letter dated August 22, 1986, the Mississippi Department of Natural Resources advised Mr. Redd that he needed to remove an additional two feet of soil from one of the surface impoundments and the serpentine channel and to provide topographical maps to demonstrate that this had been done. Respondent's Exhibit 17. The February 18, 1987 State inspection checklist states that "Another 6" [inches] of contaminated soil must be removed before certified [sic] clean closure." Complainant's Exhibit 29. Moreover, an April 13, 1987 letter submitted to the State by GR's independent professional engineer indicates that contaminated soil had not been completely removed from one of the surface impoundments until sometime after the inspection. Complainant's Exhibit 32.

For all the foregoing reasons, we conclude that, at the time of the February 18, 1987 inspection, the surface impoundments were still contaminated and that, accordingly, they were not exempt from the requirements of part 265 under section 265.228.

*Remand*: Because the Presiding Officer concluded that GR was exempt from complying with part 265 requirements, he did not make factual determinations as to whether GR had committed the part 265 violations charged in the Amended Complaint. (The only exception pertains to liability insurance coverage, which is discussed separately below.) We believe such factual determinations should be made in the first instance by the Presiding Officer. We are therefore remanding this case to a new Presiding Officer (the original one having retired) so that he or she may make such factual determinations and associated penalty determinations.[24]

*Liability Insurance*: Under paragraphs (a) and (b) of section 265.147, the owner/operator of an interim status hazardous waste management facility must maintain liability insurance coverage for bodily injury and property damage to third parties caused by both sudden and non-sudden accidents arising from facility operations. This obligation lasts until the owner/operator has submitted a certification

[24] We note that in its answer to the amended complaint, GR admitted that it did not perform many of the activities required under the part 265 provisions that GR is charged with violating. *See* Answer to Amended Complaint and Compliance Order, Request for Variance, Requests for Formal and Informal Hearings and for Other Relief at 9. With respect to those violations, therefore, the Presiding Officer presumably will only need to determine whether the penalty proposed by the Region is appropriate.

of closure to the State. 40 C.F.R. § 265.147(e).[25] On January 28, 1987, the Commission issued an "Order Relating to Liability Requirements," in which the Commission assessed a $1,000 penalty for failure to comply with the liability insurance requirement of 40 C.F.R. § 265.147. Complainant's Exhibit 26. The Order also required GR to obtain liability insurance by March 30, 1987 if GR had not submitted a certification of closure by that date.[26] Both sides agree that on March 30, 1987, GR had neither submitted a certification of closure nor obtained liability insurance. The parties disagree, however, over whether GR thereby violated the liability insurance requirement in section 265.147. GR argues that the State extended the deadline for submitting its certification of closure at least until April 13, 1987, and that on that date, its professional engineer submitted the required certification to the State. GR argues, therefore, that it was never required to obtain liability insurance. The Region, on the other hand, argues that the engineer's letter did not constitute a certification of closure and that GR was obligated to have liability insurance from March 30, 1987, onward. The Region charged GR with a 75-day violation of the liability insurance requirement, with the first day of the period being March 30, 1987.[27] In his Initial Decision, the Presiding Officer held that after November 8, 1985, GR was no longer required to obtain liability insurance because it had chosen to cease operations and clean close its facility. Initial

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[25] Section 265.147(e) provides as follows:

> *Period of coverage.* Within 60 days after receiving certifications from the owner or operator and an independent registered professional engineer that final closure has been completed in accordance with the approved closure plan, the Regional Administrator will notify the owner or operator in writing that he is no longer required by this section to maintain liability coverage for that facility, unless the Regional Administrator has reason to believe that closure has not been in accordance with the approved closure plan.

[26] The Order specified as a deadline for compliance "the date on which Respondent is scheduled to submit its certification of closure in accordance with the closure plan." *Id.* At the time the Order Relating to Liability Requirements was issued, the date GR was scheduled to submit a certification of closure was March 30, 1987, which date was set forth in an earlier State order (No. 1082-86) entitled "Order Approving Closure Plan." Complainant's Exhibit 24.

[27] In its Amended Complaint, the Region alleges that GR violated the liability insurance requirement for a period of 75 days, starting on March 30, 1987. The Region divides the 75-day period into two segments. The first segment is from March 30, 1987 to April 14, 1987 when GR's independent professional engineer stated that contamination at the site had been cleaned up. The Region then adds another 60 days because on April 14, although GR had removed the contaminated soil from the facility, it had not done other activities (primarily filling and grading) required in its approved closure plan. GR's closure plan contains a timetable giving GR 60 days to complete those other activities, and the Region relies on this timetable to arrive at the 60-day figure. Complainant's Exhibit 14; Transcript at 548-49.

Decision at 20. He also held that the engineer's letter constituted a valid certification of closure. Initial Decision at 5-6. For the following reasons, we conclude that GR did not submit a certification of closure on April 13, 1987 and that GR should have had liability insurance at least for the 75-day period specified in the complaint.[28]

At the outset it is necessary to address the Presiding Officer's holding that GR was no longer required to obtain liability insurance after November 8, 1985, because it had chosen to cease operations and clean close its facility. As discussed above, even though GR had lost interim status and had decided to cease operations and clean close the facility, it was still subject to the requirements of part 265, including section 265.147 relating to liability insurance. The obligation imposed in that section remains in effect until a facility certifies closure. 40 C.F.R. § 265.147(e).[29] Thus, the Presiding Officer erred in holding that GR was no longer subject to the liability insurance requirement after November 8, 1985.

Next we must determine whether GR certified closure of the facility on April 13, 1987. By letter dated April 13, 1987, H.M. Rollins, a professional engineer hired by GR to oversee the closure of GR's facility, reported its progress in achieving clean closure to Sam Mabry of the Bureau of Pollution Control of the Mississippi Department of Natural Resources. It reads in part as follows:

> Upon completion of disposal of the soils removed, Gordon Redd will have completed the work agreed to by the Bureau of Pollution Control as necessary for clean closure. At a meeting on July 14, 1986 and again on August 26, 1986, the Bureau of Pollution Control agreed that removal of 24 inches of soil from Pond 1 after completing sludge removal would complete the requirements for clean closure. This was based upon the data available from the E.C. Jordan study conducted

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[28] The 75-day period specified in the Amended Complaint begins on March 30, 1987. The Region presumably picked that date because the Commission, in its January 28, 1987 Order, directed that GR obtain liability insurance by that date if it had not certified closure. We note, however, that the violation of the liability insurance requirement began before March 30, 1987, and that the Region, therefore, could have charged GR with a period of non-compliance beginning before that date. The Commission's Order directing GR to obtain liability insurance by March 30, 1987, was merely an exercise of enforcement discretion, and as noted earlier in our discussion of the excuse issue, the Agency is not bound by the State's exercise of enforcement discretion. Either the Region did not know this, or the Region believed that the State's exercise of enforcement discretion in this instance was appropriate.

[29] *See supra* n.25.

> by the state. In addition, the serpentine channel and lower pond were to be analytically shown to be clean. These clean closure criteria were stipulated in correspondence including Commission Order #108286. Based upon our evaluation of the data we believe the criteria have been met as agreed upon.

Complainant's Exhibit 32. GR argues that this letter was a certification of closure in accordance with its approved closure plan. We disagree. The letter does not meet the requirements for certifications set out in section 265.115.[30] For example, the letter was not signed and submitted by the owner or operator of the facility, as is required under section 265.115. In addition, the letter does not mention GR's approved closure plan at all, even though a certification of closure is required to certify that closure was performed "in accordance with the specifications in the approved closure plan." 40 C.F.R. § 265.115. Although the April 13 letter indicates that GR removed all of the contaminated soil from the site, it says nothing about the activities that GR was supposed to perform under the closure plan. GR's approved closure plan prescribes only activities (primarily draining, grading and filling) that are to be performed *after* all contamination has been removed from the site. Complainant's Exhibit 14. This is because at the time the closure plan was submitted, it was assumed that all of the contamination had already been removed from the site. *Id.*[31] Thus, removing the contamination at the site by April 13, 1987 did not even begin to carry out the requirements that were actually in the approved closure plan.[32]

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[30] Section 265.115 provides as follows:

> Within 60 days of completion of closure of each hazardous waste surface impoundment, waste pile, land treatment, and landfill unit, and within 60 days of completion of final closure, the owner or operator must submit to the Regional Administrator, by registered mail, a certification that the hazardous waste management unit or facility, as applicable, has been closed in accordance with the specifications in the approved closure plan. The certification must be signed by the owner or operator and by an independent registered professional engineer. Documentation supporting the independent registered professional engineer's certification must be furnished to the Regional Administrator upon request until he releases the owner or operator from the financial assurance requirements for closure under § 265.143(h).

[31] The requirement to remove more soil contamination was imposed in the Order Approving Closure Plan after the closure plan had been submitted. *See* Complainant's Exhibit 24.

[32] That GR did not fulfill all of the requirements in the closure plan by April 13, 1987, is confirmed by a letter dated September 10, 1987, from Sam Mabry, Director of the Hazardous Waste Division of the Mississippi Department of Natural Resources to James H. Scarbrough, P.E., Chief Residuals Management, U.S. EPA - Region IV. In that letter, Mr. Mabry writes:

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Hence, on April 13, 1987, GR's professional engineer was in no position to certify that the facility had been closed in accordance with the approved closure plan, as is required by section 265.115. [33]

In view of the foregoing considerations, we conclude that, when GR's professional engineer sent the April 13, 1987 letter to State officials, GR did *not* certify closure in accordance with the approved closure plan.[34] We conclude, therefore, that GR was required to have liability insurance during the 75-day period beginning with March 30,

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> In conclusion, the Bureau, based on its sampling effort at the site and a review of appropriate data, finds that Gordon Redd Lumber Company has successfully completed removal of all K001 constituents related to the surface impoundment. The State believes that the company should immediately complete the remaining closure activities and certify clean closure since no hazardous waste constituents have been detected in the groundwater.

Complainant's Exhibit 39. This letter makes clear that, as of September 10, 1987, the State did not consider the April 13, 1987 letter a certification of closure.

[33] We are not convinced that the April 13th letter was even intended to be a certification of closure. The letter indicates that Mr. Rollins wrote the letter not to certify closure but to respond to a request from the State for an update on the status of GR's closure efforts. For example, the letter states: "*Per your request*, we are forwarding information regarding the status of closure at the above referenced facility." Complainant's Exhibit 32 (emphasis added). Elsewhere the letter intimates that there was more to do before the work would be completed: "Upon completion of disposal of the soils removed, Gordon Redd will have completed the work agreed to by the Bureau of Pollution Control as necessary for clean closure." *Id.* Moreover, the letter does not use the terms "certify" or "certification of closure." Nor does it indicate in any other fashion that the letter was meant to be a certification of closure.

[34] In Order No. 1369-88, issued March 23, 1988 (hereafter the 1988 Order), the Commission concluded that the April 13 letter constituted a certification of clean closure. In arriving at this conclusion, the Commission was not troubled by the fact that the completed work that was reported in the engineer's April 13, 1987 letter was *not* the work called for in the approved closure plan and that the activities specified in the approved closure plan had not been performed as of April 13, 1987. The Commission found that the closure plan had been modified and amended, although it did not specify the nature of these amendments and modifications or the time and manner in which they were carried out. The 1988 Order also expressly "ratified and confirmed" these amendments and modifications to the plan. Other than the Commission's 1988 Order, however, there is nothing in the record to suggest that the closure plan was ever modified or amended. Moreover, the fact that the Commission felt compelled to ratify and confirm these unspecified amendments and modifications in its 1988 Order suggests that such modifications or amendments did not become effective until the Commission issued the 1988 Order. Thus, we reject the Commission's conclusion that the closure plan had been modified or amended at the time the engineer's April 13, 1987 letter was sent, and we therefore reject the Commission's conclusion that the April 13, 1987 letter constituted a certification of closure in accordance with the approved closure plan. *See supra* n. 32.

1987.[35] Its failure to do so violated section 265.147. It remains to be determined whether the penalty proposed in the Amended Complaint for this violation is appropriate. We believe that such a determination should be made in the first instance by the Presiding Officer. Accordingly, we are remanding this issue to the Presiding Officer to determine whether the Agency's proposed penalty for this violation is appropriate.

C. *Creation of a New Facility*

*Introduction*: In its Amended Complaint, the Region alleges that the storage of K001 in plastic bags at the facility constituted the creation of a new hazardous waste management facility at a time when GR had neither a permit nor interim status. The Amended Complaint therefore charges GR with a failure to comply with the permit application requirements for a new hazardous waste management facility set forth in 40 C.F.R. § 270.10(f), which provides that "no person shall begin physical construction of a new HWM facility without having submitted parts A and B of the permit application and having received a finally effective RCRA permit." The Presiding Officer determined that GR had violated section 270.10(f) and imposed a penalty of $20,000. GR argues that section 270.10(f) does not apply because: (1) the storage of the garbage bags did not create a new hazardous waste management facility; (2) the garbage bags fell within the exemption at section 262.34, which allows the accumulation of hazardous waste onsite for 90 days or less without a permit or interim status if certain requirements are met; and (3) the storage of the garbage bags was authorized under section 270.72 as a change in interim status necessitated by a State Order. For the following reasons, we reject these arguments and affirm the Presiding Officer's holding as to liability.

*The Definition of Facility*: In support of its contention that section 270.10(f) does not apply, GR first argues that the storage of the garbage bags did not create a new HWM facility. According to GR, the meaning of the term is controlled by the definition of facility in section 260.10, which reads as follows:

> [A]ll contiguous land, and structures, other appurtenances, and improvements on the land, used for treat-

[35] At the hearing, Gordon Redd testified that, because of rainy weather, State officials had given him an extension of time in which to submit a certification of closure. Transcript at 994-95 ("[W]e just couldn't go down in those ponds with the equipment * * *."). Gordon Redd did not specify how long the extension was supposed to last. There is nothing in the record to suggest, however, that the deadline for obtaining liability insurance was also extended. Accordingly, we conclude that the Region correctly counted the period between March 30, 1987, and April 13, 1987, as part of the period of non-compliance.

> ing, 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).

GR argues that this definition "cannot be stretched to cover this situation * * *." GR's Appeal Brief at 6. It fails to explain, however, what it means by this assertion, thus leaving us to speculate as to the precise rationale, if any, GR might muster in support of its position. This we decline to do.

There is no question that, at the time of the inspection, the garbage bags and the surface impoundments occupied the same contiguous piece of property and were therefore part of the same "facility" within the meaning of section 260.10. The question is whether that facility should be characterized as a *new* hazardous waste management facility or an *existing* hazardous waste management facility for purposes of section 270.10(f). The regulatory consequence of this distinction is that, while a "new" hazardous waste management facility may not start operating until it obtains a permit, 40 C.F.R. § 270.10(f),[36] an "existing" hazardous waste management facility may operate under interim status until it is required to obtain a permit. *See* 40 C.F.R. § 270.70(a).[37] Under section 270.2, "existing hazardous waste management facility" is defined as "a facility which was in operation or for which construction commenced on or before November 19, 1980," and a "new hazardous waste management facility" is defined as a "facility which began operation or for which construction commenced after November 19, 1980." For the following reasons, we believe that, for purposes of determining whether GR was required under section 270.10(f) to have a permit for the garbage bags, GR's facility (meaning the entire contiguous piece of property) was appropriately classified as a new hazardous waste management facility.

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[36] Section 270.10(f)(1) provides that "no person shall begin physical construction of a new HWM facility without having submitted parts A and B of the permit application and having received a finally effective RCRA permit."

[37] Section 270.70(a) provides in pertinent part as follows:

> Any person who owns or operates an "existing HWM facility" or a facility in existence on the effective date of statutory or regulatory amendments under the Act that render the facility subject to the requirement to have a RCRA permit shall have interim status * * *.

40 C.F.R. § 270.70(a).

If the garbage bags of K001 waste had been stored on a separate parcel of land not containing the surface impoundments, it is beyond dispute that the storage of the garbage bags there would have created a new hazardous waste management facility, subject to section 270.10(f). We see no reason why the presence of the former interim status surface impoundments on the property should change the analysis. At the time of the inspection, GR had ceased operating the surface impoundments, having lost its interim status. Because its authority to operate under interim status had been terminated, GR had lost its eligibility to ever operate the surface impoundments under interim status again.[38] By losing its right to operate under interim status, the facility had, for purposes of the permitting requirements in section 270.10, lost its status as an "existing hazardous waste management facility," since the regulatory benefit of that status—the right to operate under interim status—had been permanently lost. Moreover, the only hazardous waste management unit being operated at the facility at the time of the inspection was the unit where the garbage bags of K001 waste were being stored. This hazardous waste management unit began operating *after* GR's loss of interim status and it was located on a part of the facility not previously used for hazardous waste management operations. Because the only hazardous waste management unit in operation at the facility at the time of the inspection was a new one and because the facility had for purposes of the permitting requirements of section 270.10 lost its status as an existing hazardous waste management facility, we conclude that at the time of the inspection, the facility was properly characterized as a "new hazardous waste management facility," within the meaning of section 270.10(f).[39]

*Section 262.34 Exemption*: GR argues that section 262.34 provided the necessary authorization to store K001 waste in the garbage bags on-site without obtaining a permit. Section 262.34 provides that "a generator may accumulate hazardous waste on-site for 90 days or less without a permit or without having interim status," provided the generator meets the safety requirements set out in that section. At the

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[38] *See* RCRA § 3005(e), 42 U.S.C. § 6925 ("This paragraph shall not apply to any facility * * * if authority to operate the facility under this section has been previously terminated."); 40 C.F.R. § 270.70(c)(Facility may not operate under interim status "if authority to operate a facility under RCRA [e.g., interim status] has been previously terminated.").

[39] GR apparently admitted as much in connection with the State enforcement action relating to the garbage bags. According to the Commission's April 22, 1987 Order, in which the State assessed a penalty for violations related to the garbage bags, GR admitted to the Commission that his facility had "stored hazardous waste in an unauthorized area in violation of MHWMR Section 270.10(f)." Complainant's Exhibit 35. If the Commission's Order is accurate, then GR has in effect admitted that the garbage bags constitute a new facility, since the placement of the garbage bags would only violate section 270.10(f) if they constitute a new facility within the meaning of that provision.

time of the inspection, those requirements were as follows: (1) to place the waste in containers that comply with certain requirements of subpart I of 40 C.F.R. part 265 (governing containers) and to be exempt from most requirements of subparts G and H of part 265; (2) to clearly mark each container with the date upon which each period of accumulation began so that it was visible for inspection; (3) to clearly mark each container with the words, "Hazardous Waste"; and (4) to comply with the requirements for owners or operators in part 265, subparts C (governing preparedness and prevention) and D (governing contingency plan and emergency procedures) and with section 265.16 (governing personnel training). 40 C.F.R. § 262.34(a) (1987).

GR argues that it was in substantial compliance with section 262.34, despite minor deviations from the requirements of that section:

> Surely the regulations should not be read to cause a new hazardous waste management facility to spring into existence every time temporary storage containers of a generator under § 262.34 lose a label or open inadvertently.

GR's Appeal Brief at 8. GR contends that, at most, the Region proved that it had deviated from certain temporary container storage regulations under sections 265.170 through 265.177. We disagree.

GR is raising its claim of exemption under section 262.34 as a *defense* to a count in the complaint charging it with a failure to have a permit that authorizes these particular storage activities. The nature of the exemption is such that GR should bear the burden of going forward with evidence to show its entitlement to the exemption, although the Region bears the ultimate burden of persuasion to show that the violation occurred as alleged in the complaint. *See In re Standard Scrap Metal Company*, TSCA Appeal No. 87-4, at 8 & n.9 (CJO, August 2, 1990) ("Generally, a statutory exception (or exemption) must be raised as an affirmative defense, with the burden of persuasion and the initial burden of production [as to the defense but not the ultimate violation] upon the party that seeks to invoke the exception.").[40] The only evidence supporting GR's entitlement to the exemption is Mr. Redd's testimony that the bags containing the waste had only been stored at the site for "days" rather than months. Transcript at 1030. His testimony did not purport to demonstrate that any of the other elements of the exemption had been satisfied. Against his limited, self-

[40] *See* 40 C.F.R. § 22.24 ("Following the establishment of a prima facie case, respondent shall have the burden of presenting and of going forward with any defense to the allegations set forth in the complaint.").

serving testimony are numerous photographs in the record showing plastic garbage bags at the storage site, some of them leaking and spilling their contents, without any visible hazardous waste markings or dates. Complainant's Exhibit 48. The EPA inspector who took the photographs of the site confirmed that the bags were not labeled or marked. Transcript at 86-87. The inspector also testified that GR had failed to comply with the requirements in part 265, subparts C (governing preparedness and prevention) and D (governing contingency plan and emergency procedures), and with section 265.16 (governing personnel training). Transcript at 87, 137, 138, 146, 148. As noted above, the exemption at section 262.34 is only available if such requirements are met. On balance, we do not think that GR has met its burden of going forward to show its entitlement to the exemption.

To meet this burden it would be necessary for GR to make a more convincing showing of compliance with the elements of entitlement. In particular, it would be necessary to establish compliance with the hazardous waste marking and dating requirements. As noted above, the evidence in the record suggests, and the Presiding Officer determined, that no effort was made to mark the bags with the words "hazardous waste" or with the dates they were placed in the clearing. Complainant's Exhibit 48. Failure to meet the marking requirements is not, as GR suggests, a minor deviation from the requirements of the section 262.34 temporary storage exemption. These are substantial and serious failings on GR's part. The dating requirement establishes the date when the materials were placed in storage and thus provides the principal method for calculating compliance with the 90-day storage exemption. Absent compliance with the dating requirement, there is no objective means by which the Agency can determine whether the claimed exemption is legitimate or merely an after-the-fact effort to disguise noncomplying conduct.

*Section 270.72*: GR next contends that the storage of garbage bags of K001 waste without a permit was authorized under section 270.72. That section provides that the owner or operator of an interim status facility may make changes in the processes used for the treatment, storage, or disposal of hazardous waste or may add processes if "the change is necessary to comply with a Federal, State or local requirement" and the owner or operator submits a revised part A permit application prior to such change. 40 C.F.R. § 270.72(a)(3)(ii). GR argues that the Commission's March 1983 Order (*see supra* section B of this decision) directed GR to construct a waste water treatment facility and to close the hazardous waste surface impoundments. GR explains that when the facility made this change pursuant to the 1983 State Order, the facility began generating K001 sludge in solid form, which

needed to be temporarily held pending off-site disposal. GR argues, therefore, that the storage of the garbage bags of K001 waste was authorized by section 270.72(a)(3)(ii) because it was necessitated by the Commission's Order.

We conclude, however, that section 270.72 is unavailing. GR admits that "[t]he record does not disclose whether Gordon Redd amended the existing Part A Application on file as required by section 270.72(a)(3)." GR's Appeal Brief at 10. Moreover, Gordon Redd does not argue, and there is nothing in the record to suggest, that the placement of the garbage bags occurred *before* the loss of interim status. Accordingly, section 270.72, which applies to changes that occur during interim status, has no application here.

For all the foregoing reasons, we uphold the Presiding Officer's determination that the storage of the garbage bags of K001 waste created a new hazardous waste management facility in violation of section 270.10(f).

*Part 264 Requirements*: The amended complaint also charges GR with numerous part 264 violations in connection with the storage of K001 waste in garbage bags.[41] The amended complaint, however, does not propose any penalties for such alleged violations. *See* Complainant's

[41] The complaint lists the following violations of Part 264: (1) Failure to have a waste analysis plan or records available on-site as required by 40 C.F.R. § 264.13; (2) Failure to make provisions to prevent unknowing entry, and to minimize the possibility of an unauthorized entry into the active portion of the facility, as required by 40 C.F.R. § 264.14; (3) Failure to have an inspection schedule or inspection records available as required by 40 C.F.R. § 264.15; (4) Failure to have personnel training records available on site as required by 40 C.F.R. § 264.16; (5) Failure to maintain and operate the facility so as to minimize the possibility of release of hazardous waste constituents to the environment as required by 40 C.F.R. § 264.31; (6) Failure to provide evidence that safety equipment was present and/or maintained on-site as required by 40 C.F.R. §§ 264.32 and 264.33; (7) Failure to provide evidence that any arrangements had been made with local or state emergency authorities as required by 40 C.F.R. § 264.37; (8) Failure to have a contingency plan available on-site as required by 40 C.F.R. § 264.53; (9) Failure to have evidence that an employee had been identified as the emergency coordinator, as required by 40 C.F.R. §§ 264.52 and 264.55; (10) Failure to have operating records on-site as required by 40 C.F.R. §§ 264.73 and 264.74; (11) Failure to have and maintain financial responsibility for bodily injury and property damage to third parties caused by sudden (for both surface impoundments and waste piles/storage areas) or non-sudden (for surface impoundments only) accidental occurrences arising from the operation of the facility or group of facilities, as required by 40 C.F.R. § 264.147(a); (12) Failure to properly use, manage, inspect, and provide a containment system for containers or hazardous waste, as required by 40 C.F.R. §§ 264.171, 264.173, 264.174, and 264.175; (13) Failure to institute a detection monitoring program under 40 C.F.R. §§ 264.91 and 264.98; (14) Failure to have a closure plan for the waste piles/container storage area, as required by 40 C.F.R. § 264.112; (15) Failure to develop a cost estimate and establish financial assurance for closure, as required by 40 C.F.R. §§ 264.142 and 264.143; (16) Failure to meet the design and operational requirements, and monitoring and inspection requirements, for waste piles, as specified in 40 C.F.R. §§ 264.251 and 264.254.

Exhibit 46 (penalty calculation worksheets); Transcript at 602-04 (testimony of Hugh Hazen). The Presiding Officer found that GR had violated section 270.10(f), as discussed previously, but he did not make any findings about the part 264 violations charged in the amended complaint. Nor did he impose a penalty for such violations. Initial Decision at 13, 24.

GR argues on appeal that the requirements of part 264 were not applicable to the garbage bags because GR was a generator accumulating waste on-site in compliance with section 262.34 and therefore exempt from part 264 under section 264.1(g)(3). As we concluded above, however, GR failed to qualify for the exemption. GR also argues on appeal that section 264.3 makes the garbage bags subject to part 265 in lieu of the requirements of part 264. We disagree. That section only applies to facilities operating under interim status,[42] and at the time of the inspection, GR was not operating under interim status. Thus, we conclude that the storage of K001 in garbage bags at the facility was subject to the requirements of part 264.

It is not clear why the Initial Decision fails to address the part 264 violations alleged in the Amended Complaint. Whatever the reason, the charges in the Amended Complaint relating to those violations are not irrelevant. If allowed to stand, such charges may be cited in future enforcement actions as part of GR's compliance history. GR has contested the part 264 charges in the Amended Complaint both at the hearing level and on appeal, and it is entitled to a determination as to whether they occurred, even though the Region did not propose a penalty for them. Accordingly, we are remanding this case so that a new presiding officer can make determinations as to whether GR committed the part 264 violations charged in the Amended Complaint and if so whether penalties are appropriate.[43]

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[42] At the time of the inspection, section 264.3 provided as follows:

> A facility owner or operator who has fully complied with the requirements for interim status—as defined in section 3005(e) of RCRA and regulations under § 270.70 of this chapter—must comply with the regulations specified in part 265 of this chapter in lieu of the regulations in this part, until final administrative disposition of his permit application is made.

40 C.F.R. § 264.3 (1987).

[43] We note that in its answer to the Amended Complaint, GR admitted that it did not perform many of the activities required under the part 264 provisions that GR is charged with violating. *See* Answer to Amended Complaint and Compliance Order, Request for Variance, Requests for Formal and Informal Hearings and for Other Relief at 9. With respect to those violations, therefore, the Presiding Officer presumably will only need to decide if penalties should be imposed for such violations.

*The Appropriateness of the Penalty*: GR also challenges the appropriateness of the penalty imposed by the Presiding Officer for the violation of section 270.10(f). In particular, GR argues that the potential for harm and the extent of deviation represented by that violation were insignificant. We disagree. For the violation of section 270.10(f) the Region calculated the gravity of the violation in accordance with the RCRA Civil Penalty Policy. Under the Penalty Policy, the gravity of the violation has two components: the potential for harm and the extent of deviation. The Agency concluded that both the potential for harm and the extent of deviation of the violation were major. Complainant's Exhibit 46 (penalty calculation worksheet). For violations that are major in both respects, the Penalty Policy prescribes a penalty range of $20,000 to $25,000. Complainant's Exhibit 53 (Final RCRA Civil Penalty Policy, dated May 8, 1984). The Agency chose a penalty of $25,000. Complainant's Exhibit 46.

We are of the view that the Presiding Officer correctly characterized the potential for harm and extent of deviation presented by this violation. The placement of garbage bags full of K001 waste without obtaining a permit presented a major potential for harm because it resulted in a substantial likelihood of exposure to hazardous waste. Many of the garbage bags were ruptured and leaking and some had completely disintegrated. If GR had obtained a permit before placing the garbage bags in the clearing, the permitting process in all probability would have caused it to store the waste in a much safer manner. Furthermore, State officials would have been alerted to the existence of this hazardous waste unit and could have inspected it to ensure that the storage was being accomplished in accordance with the safety precautions prescribed in the permit. The violation also represented a major deviation from the rules. GR was in total non-compliance with section 270.10(f), and made no effort to comply with the rule. We therefore uphold the Presiding Officer's gravity determination.

We are nevertheless remanding the penalty determination because the Presiding Officer deviated from the penalty proposed in the Amended Complaint without explaining his reasons for doing so. With respect to the violation of section 270.10(f), the Presiding Officer assessed a $25,000 penalty, the same figure calculated by the Region for that violation. The Presiding Officer then reduced the penalty by $5,000 to reflect the penalty assessed in the Commission's April 22, 1987 Order, a reduction that the Region also proposed. The Presiding Officer, however, did not reduce the penalty amount any further to reflect GR's good faith efforts in quickly removing the garbage bags from the clearing in the woods, even though the Region had proposed a reduction of $4,700 for that reason. As a consequence, the penalty

imposed by the Presiding Officer of $20,000 differs from the penalty proposed in the Amended Complaint ($15,300). The Presiding Officer, however, did not explain his reasons for deviating from the penalty proposed in the Amended Complaint, as he is required to do under section 22.27(b) of the Consolidated Rules.[44] We are therefore remanding the penalty determination to the new Presiding Officer so that he or she may either bring the penalty into line with that proposed by the Region or explain his or her reasons for not doing so.

## **III.** *CONCLUSION*

For all the foregoing reasons, we have come to the following conclusions: (1) The Region fully complied with the section 3008(a)(2) notice requirement; (2) At the time of the February 18, 1987 inspection, the surface impoundments were not exempt from the requirements of part 265; (3) GR did not certify closure in the April 13, 1987 letter to the State, and was required to have liability insurance during the 75-day period beginning March 30, 1987; (4) The storage of garbage bags of K001 waste at the site created a new hazardous waste management unit without a permit in violation of section 270.10(f); (5) At the time of the February 18, 1987 inspection, the garbage bags of K001 waste were not exempt from the requirements of part 264; and (6) The Presiding Officer's gravity determination for the violation of section 270.10(f) was appropriate, but the Presiding Officer imposed a penalty for that violation different from that proposed by the Region without explaining his reasons for doing so. We are remanding this case so that a new Presiding Officer can: (1) determine whether GR committed the part 265 violations alleged in the amended complaint (other than the liability insurance violation) and render a decision based on that determination; (2) determine whether the penalty proposed in the amended complaint for the failure to obtain liability insurance is appropriate; (3) either bring the penalty determination for the violation of section 270.10(f) into line with the penalty proposed by the Region or explain his or her reasons for not doing so; and (4) determine whether GR committed the part 264 violations alleged in the complaint and render a decision based on that determination.

So ordered.

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[44] That section provides that "[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).