THE OFFICE OF ENVIRONMENTAL ENFORCEMENT
SPECIAL MAGISTRATE
IN AND FOR THE
COUNTY OF ESCAMBIA, STATE OF FLORIDA

ESCAMBIA COUNTY, FLORIDA

vs.

CASE NO.: CE#14-06-02079
LOCATION: 6990 ROLLING HILLS RD
PR#261S305105002001

SOUTH PALAFOX
PROPERTIES, LLC 6990
Rolling Hills Rd Pensacola,
FL 32505

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FINAL ORDER

THIS CAUSE came before the undersigned at a duly noticed hearing on February 24, 2015, upon Petition of the Office of Environmental Code Enforcement for Escambia County. All parties were present for the hearing and were represented by counsel. The undersigned has considered the evidence presented at the hearing as well as the arguments of counsel. This Order sets forth the undersigned's findings of fact and conclusions of law as to five violations alleged to have been committed by South Palafox Properties, LLC.

Findings of Fact[1]

The property at 6990 Rolling Hills Road is owned by South Palafox Properties LLC (hereafter "Respondent" or "South Palafox Properties"), and identified by Escambia County

[1] Findings of fact must be supported by competent and substantial evidence of record. While the strict rules of evidence applying to formal court proceedings do not govern code enforcement hearings, the evidence relied upon by a quasi-judicial tribunal to sustain its ultimate finding should, "be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the 'substantial' evidence should also be 'competent.'" *Agner v. Smith*, 167 So. 2d 86, 91 (Fla. 1st DCA 1964) quoting *DeGroot v. Sheffield*, 95 So.2d 912 (Fla.1957).

Property Appraiser Parcel Number 261S305105002001. Proof of ownership was admitted as Exhibit 1. South Palafox Properties operates the Rolling Hills Construction and Demolition Debris (C&DD) Facility on site at 6990 Rolling Hills Road. The Rolling Hills C&DD Facility was issued an Escambia County Permit to operate as a Regional Facility on August 16, 2007. The permit has been renewed annually since that time. The original permit was admitted as Exhibit 2. A Notice of Violation dated June 17, 2014, in Case No. CE 140602079, was served upon South Palafox Properties LLC via hand delivery to the facility manager, Kevin Parsley, and mailed certified mail by Escambia County Code Enforcement Officer, Terrence Davis. The signed Notice of Violation and proof of mailing was admitted as Exhibit 3. A Notice of Violation dated June 24, 2014, in Case No. CE 140602079, was served upon South Palafox Properties LLC via hand delivery to the facility manager, Kevin Parsley, and mailed certified mail by Escambia County Code Enforcement Officer, Terrance Davis. The signed Notice of Violation and proof of mailing was admitted as Exhibit 4.

At all times relevant to the proceedings, the Rolling Hills C&DD Facility operated as a Regional Facility pursuant to Escambia County Permit renewals issued January 17, 2013, and February 6, 2014. The renewal permits are admitted as Composite Exhibit 5.

Nuisance Odor: Escambia County Code Enforcement Officer Terrance Davis first noted an issue with odor at the Rolling Hills facility in April of 2014. In response to citizen complaints, Officer Davis visited the Rolling Hills property. At the time of his initial visit, Officer Davis noted an offensive odor off-site, emanating from the Rolling Hills Facility. The odor was recognized as a hydrogen sulfide (H_2S) odor and smelled similar to "rotten eggs." Officer Davis issued a Notice of Violation pertaining to offensive nuisance odor to the facility in June of 2014. (See Exhibit 3, Notice of Violation). Officer Davis visited on-site at the facility

approximately five or six times and "dozens of times" off-site since issuing the Notice of Violation. During the subsequent visits off-site, Office Davis continued to note a strong smell similar to that of "rotten eggs." The offensive odor was noted by Officer Davis most recently on February 4, 2015. The offensive odor has been detected at the Marie K. Young Community Center, which is located off-site adjacent to the Rolling Hills Facility. The odor has also been detected at the intersection of Rolling Hills Road and Bud Johnson Road, an intersection also located off-site and adjacent to the Rolling Hills Facility. The County is still receiving odor complaints, as recently as February 2015, in relation to an offensive odor at areas off-site surrounding Rolling Hills Construction and Demolition Debris Facility.

Florida Department of Environmental Protection (FDEP) Environmental Specialist, Chad Nowling, has noted an off-site "rotten egg, sulfur-like smell" from the Rolling Hills Facility on multiple occasions, including January 29, 2015. The FDEP has received complaints from neighbors and citizens next to the Rolling Hills C&DD facility regarding the odor.

The Escambia County Community and Environment Department has monitored for hydrogen sulfide around the Rolling Hills C&DD facility from July 2014 to the present. The Jerome 631X, which was selected by Escambia County to monitor for hydrogen sulfide, can be used for monitoring hydrogen sulfide in the ranges reported by the equipment. Information about the Jerome 631x is admitted as Exhibit 8. Escambia County personnel charged with monitoring for hydrogen sulfide were trained to use the Jerome 631X equipment and used the equipment properly in accordance with their training. The Jerome 631X monitors utilized by Escambia County personnel were properly calibrated and accompanied by a certificate of calibration from the manufacturer. The calibration certificates were admitted without objection as Exhibit 8.

Escambia County made contemporaneous records based on readings from the Jerome 631X reflecting hydrogen sulfide levels around the Rolling Hills site and, more specifically, at the Marie K. Young Wedgewood Community Center. These records extend from July 2014 into February 2015 and were admitted as Exhibit 10.a.1 through Exhibit 10.b.25. The records show the presence of hydrogen sulfide in the areas immediately surrounding the Rolling Hills site. In numerous instances the concentration of hydrogen sulfide exceeds the minimum odor thresholds of the Office of Safety and Health Administration (OSHA) of .010 ppm,[2] and, in some instances, the concentration exceeds the .070 ppm "acute exposure" level established by the Agency for Toxic Substances & Disease Registry (ATSDR). Readings as recent as February 12, 2015 (Exhibit 10.b.23) reflect three consecutive days in which hydrogen sulfide readings exceeded the .070 ppm "acute exposure" standard set by ATSDR. Brett Wipf, Escambia County's Environmental Program Manager responsible for monitoring environmental data, testified that he is still seeing exceedances of the minimum hydrogen sulfide threshold levels for odor detection.[3]

Scott Miller, the managing partner in charge of operations for Respondent, testified generally to his belief that the odor may be coming from sources other than the Rolling Hills C&DD operation, such as nearby wetlands or an ECUA sewer pipe. However, Respondent provided no scientific data or expert testimony to indicate these other sources are the origin of the hydrogen sulfide.[4] Conversely, Brett Wipf, Escambia County's Environmental Program

[2] Taylor "Chips" Kirschenfeld, Senior Scientist and Division Manager of the Water Quality and Land Management Divisions for Escambia County, testified that when the machine showed readings over the minimum odor threshold, he also smelled a rotten egg odor in the air.

[3] Mr. Wipf testified that wind is a factor in detecting hydrogen sulfide and that the vast majority of detections were when the detector was downwind of the Rolling Hills facility.

[4] The only recorded measurements of hydrogen sulfide levels were introduced by the County. No measurements were introduced by the Respondent.

Manager responsible for monitoring environmental data testified that he had seen no data to suggest that either the ECUA sewer pipe or the wetlands were the source of the hydrogen sulfide being detected by the Jerome monitor at the Marie K. Young Wedgewood Community Center.[5]

Respondent's Director of Operations, Kevin Parsley, testified that a hotline set-up to receive complaints about odor was still receiving complaints in the month preceding the hearing of this matter. Various residents including, without limitation, Judy Cook,[6] Aaron Wiley, and Larry Williams, testified to the ongoing presence of the hydrogen sulfide odor at a level that annoys, disturbs and interferes with the use and enjoyment of their properties. Multiple witnesses including residents and county employees testified to the offensive, objectionable and severely annoying nature of the odor which is ongoing. Judy Cook works at the Marie K. Young Center and testified that the odor interfered with the ability to conduct programs and hold events at the Center. The testimony of these witnesses was consistent with the testimony of Officer Davis and other County employees regarding the offensive nature of the hydrogen sulfide odor. The odor is continuing, and extends beyond the limits of Respondent's property.[7] It severely annoys and disturbs surrounding property owners in the enjoyment of their property.

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[5] Mr. Wipf testified that he had done very limited testing in these areas and had not seen any data to suggest these areas were significant sources of the hydrogen sulfide odor

[6] Judy Cook, a resident of the Wedgewood community, has lived at 706 West Pinestead Road for the past thirty-six (36) years. Ms. Cook testified that there are objectionable odors coming from the landfill both day and night. The odor is noted both inside and outside of her home. The odor has affected her ability to entertain at her home. The air surrounding her home causes her visitors eyes to burn. The offensive nature of the odor causes her embarrassment. Visitors must cover their faces with a washcloth in order to breathe.

[7] Respondent's managing partner, Scott Miller, testified that Rolling Hills had consulted with experts on odor. Respondent claimed that it had retained experts who "indicate that the odor reduction techniques employed by the Respondent are the best available practices to monitor and eliminate hydrogen sulfide odors at C&D Facilities." (Closing par. 93) Yet, Respondent presented no such testimony at the hearing of this matter, nor did Respondent attempt to present

Nuisance Dust and Dust Suppression System: Prior to the June 17, 2014, Notice of Violation issued by Officer Davis, dust was observed coming off of the Rolling Hills site and onto surrounding property. At that time, the dust was in an amount sufficient to cause severe annoyance by covering and penetrating vehicles offsite.

The Director of Operations for the Rolling Hills C&DD facility, Kevin Parsley, testified that Respondent used a 1,000 gallon water truck, filled "several times a day" to spray water on the roads within the facility to suppress dust. Parsley testified that Respondent added clay and crushed asphalt to the roadways in the facility to aid in dust suppression.

Officer Davis performed dozens of subsequent off-site inspections following the Notice of Violation but did not detect dust from Respondent's facility as being an issue off site.[8] Dust in an amount sufficient to cause severe annoyance has been effectively suppressed.

Cover: Cover is dirt or material that is placed on top of the debris at the C&DD facility to hold in odor. At the time of the June 17, 2014, Notice of Violation issued by Officer Davis, there was a lack of sufficient cover on the working face of the facility. The lack of sufficient cover has continued and is ongoing as evidenced by visual inspection[9] and the ongoing hydrogen sulfide odor.[10]

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any expert testimony rebutting the test results presented by the County or the testimony of the County's code enforcement officer or Environmental Program Manager, Bret Wipf, regarding the source of the odor and its ongoing nature.

[8] Officer Davis is, of course, the County representative tasked with investigating alleged violations and initiating enforcement procedures. While there was some conflicting testimony that Respondent's facility is an ongoing source of nuisance dust, the undersigned finds Officer Davis' testimony on this issue persuasive.

[9] Officer Davis visited the Rolling Hills property on June 11, 2014 and noted that there was debris for disposal that remained open and uncovered on the property. Photographs of the violation were taken. Officer Davis returned to the property on June 17, 2014, and again on July 1, 2014. Officer Davis noted the same area remained un-covered with open debris on the ground

Working or Operational Height: The working or operational height of the C&DD "mound" is currently visible from beyond the property line.[11] Further, the height also exceeds the height represented by Respondent in its permit application.[12]

LCD Permitting: At the time of the June 17, 2014, Notice of Violation, Respondent was accepting land clearing debris (LCD) onto a portion of its property that was not permitted to accept either C&DD or LCD.

On August 21, 2014, the Escambia County Board of County Commissioners passed Ordinance Number 2014-31 creating Chapter 82-229 of the Escambia County Code of

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during both subsequent visits. Photographs of the uncovered debris were admitted as Exhibit 9a. The photographs depict areas of the working face that lack cover. The photographs, taken June 11, 2014, depict an uncovered banana tree. (Exhibit 9a). The tree remains visible in photographs taken July 1, 2014. (Exhibit 9d). The photographs were taken twenty-one (21) days apart, demonstrating a violation of the bi-weekly cover requirement. Photographs, from as recently as February 18, 2015, indicate a lack of sufficient cover on the working face. (Exhibit 9f). In addition, Doyle Butler, an Engineering Coordinator for Escambia County Department of Solid Waste, testified to observing inadequate cover this year and as recently as February 19th.

Respondent did not provide any photographic evidence to rebut the County's evidence or to otherwise support its position that adequate cover exists on the working face (of either its C&DD operations or its LCD operations) either at the time of the violation or currently.

[10] Doyle Butler testified the inadequacy of the cover leads to an increase in odor emanating from the facility.

[11] Multiple witnesses testified without rebuttal to being able to see the mound from various locations off-site. Respondent's Director of Operations, Kevin Parsley, could not testify as to the current height of the mound, but admitted it was visible off property. Scott Miller, Respondent's managing partner in charge of operations admitted that the height of the hill currently exceeds 130 feet.

[12] The County-approved operational plans for Rolling Hills C&DD Facility are part of the permitted application (which is incorporated into the permit) and specify that the proposed upper elevation of waste at the facility will range up to 130 feet, NGVD. (See Exhibit 5, section 2.3 of the operational plan). The height of the facility has exceeded 130 feet NGVD as reflected in a topographic survey completed by professional surveyor, Robert Scott Mills, Baskerville-Donovan, Inc., on July 25, 2014. The survey is admitted as Exhibit 7.

ordinances which placed a moratorium on permitting or re-permitting C&DD and LCD facilities. The ordinance further provided in relevant part:

> If Escambia County receives a completed permit application and the necessary permit application fee for a CDD or LCD facility prior to the commencement of the moratorium, that CDD or LCD facility may operate during the moratorium, provided that all activities comply with applicable Escambia County codes, ordinances, and regulations.

Although no permit application (or proof of paying the fee for such application) was offered into evidence, the testimony of Tim Eagan was that a permit to operate an LCD facility was applied for and the fee for such application paid prior to August 21, 2014. At the time, the facility was subject to a Notice of Violation for accepting LCD materials without a permit.

Testimony of Pat Johnson and Officer Davis demonstrates the land clearing debris was deposited on a portion of the property that was not permitted to receive land clearing debris, nor was it covered by the existing C&DD permit. Photographic evidence (Ex. 9.a. p 6-9; 9.d. p 3) presented by the County shows the land clearing debris deposited on Respondent's property did not have cover or did not have sufficient cover.

Conclusions of Law

Due Process (Adequate Notice)

Respondent maintains that, as a matter of law, all violations must be dismissed for failure to comply with County ordinances requiring that the Notice of Violation specify the action needed to cure the violation and that the notice provide a reasonable time for doing so. This argument fails.

The action needed to cure the violation is apparent on the face of the Notice and the specific requirements for compliance are apparent from reading the underlined portions of the Notice. For example, Violation 2 of the June 17, 2014, Notice quotes the ordinance requirement that "All working faces must be covered bi-weekly by cover sufficient in quantity to deprive

debris of oxygen, minimize the risk of fire and prevent emission of objectionable odors." It is obvious that the action needed to correct the violation is to *implement* bi-weekly cover sufficient in quantity to deprive debris of oxygen, minimize the risk of fire and prevent emission of objectionable odor. Violation 4 requires that an LCD facility cannot be operated without "first obtaining an interim permit from the department of solid waste management." There can be no question but that the Notice of Violation is requiring that a permit *be obtained* in order to cure the violation. Violation 2 of the June 24, 2014, Notice of Violation forbids the working or operational height from exceeding the permitted height and from being visible from beyond the property. Again, it is apparent that to cure the violation the operational height must be reduced so that it does not exceed the permitted height and is not visible from beyond the property.

In regard to Violation 1 of the June 24, 2014, Notice of Violation, Scott Miller, Respondent's managing partner, testified he understood from looking at the Notice of Violation that the County was alleging that "the facility is solely responsible for the emission of odors into the neighborhood surrounding the Rolling Hills facility." This testimony belies any confusion over what was being alleged in Violation 1. Further, it was clear from the testimony of Mr. Miller and the manager of the facility, Kevin Parsley, that Respondent understood that to cure the violation it needed to stop the discharge of the odor in a manner that constituted a nuisance.

Furthermore, there was no credible testimony from the Respondent's witnesses indicating Respondent did not understand the violations being alleged or the action needed to cure the violation.

Respondent also argues it was not given reasonable time to cure its violation.[13] However, this argument would only be pertinent if the undersigned were to find that Respondent had corrected the violation but had not done so within the time specified in the Notice of Violation. If the violation remains uncorrected, then there is no need for a determination that the time to correct was or was not reasonable. There is no need for such a determination. Respondent has been afforded due process.

Violation 1 – Nuisance Odor and Dust (Notice of Violation 6/17/2014)

Escambia County alleges Respondent's Rolling Hills C&DD facility has caused a nuisance odor and emission of dust in violation of Escambia County Code Sec 82-227(1)(b) which states:

> General operating requirements for regional rural, infill, and transfer C&DD facilities and for land clearing debris facilities. The following minimum requirements must be met at all times by the operator or owner, as appropriate, of the facility: (1) Regional facilities. b. No person shall cause, suffer, allow or permit the discharge into the air or dust, fume, gas, mist, odor, smoke or vapors, or any combination thereof, so as to constitute a nuisance as defined herein.

Section 82-225(cc) of the Escambia County Code of Ordinance defines nuisance as the following:

> "*Nuisance* generally means anything which annoys or disturbs one in the free use, possession or enjoyment of his or her property, or which renders its ordinary use or occupation uncomfortable, or anything which is detrimental to health or threatens danger to persons or property within the county. Nuisance specifically shall include the use of any property, facilities, equipment, processes, products or compounds, or the commission of any acts that cause or materially contribute to:
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> (1) The emission into the outdoor air of dust, fume, gas, mist, odor, smoke or vapor, or any combination thereof, of a character and in a quantity as to be detectable by a considerable number of persons or the public, at any point beyond the property limits of the premises occupied or used by the person responsible for the source thereof, so as to interfere with their health, repose or safety, or cause severe annoyance or discomfort, or

[13] This is a change from the Respondent's original argument in its pre-hearing submission in which it argued that the Notices of Violation did not specify any time for compliance.

> tends to lessen normal food and water intake, or produces irrigation of the upper respiratory tract, or produces symptoms of nausea, or is offensive or objectionable to normal persons because of inherent chemical or physical properties, or causes injury or damage to real property, personal property or human, animal or plant life of any kind or which interferes with normal conduct of business, or is detrimental or harmful to the health, comfort, living conditions, welfare and safety of the inhabitants of this county.
>
> (2) Any violation of provisions of this division which becomes detrimental to health or threatens danger to the safety of persons or property, or gives offense to, is injurious to, or endangers the public health and welfare, or prevents the reasonable and comfortable use and enjoyment of property by any considerable number of the public. (82-225(cc)).[14]

Competent and substantial evidence exists that Respondent's Rolling Hills Facility is the source of off-site nuisance odors. The facility was first cited for the odor on June 17, 2014. Any alleged or attempted remediation of the offensive odor has been inadequate as the facility continues to emit a nuisance odor in violation of Escambia County Code of Ordinances. As of February 2015, objectionable and offensive nuisance odors continue to be produced by the Rolling Hills facility.

Respondent is in violation of Sec 82-227(1)(b) in that it has caused, suffered, allowed, or permitted the discharge into the air of odor so as to constitute a nuisance as defined by Section 82-225(cc), and that violation is ongoing.

Competent and substantial evidence exists that the Rolling Hills facility was the source of off-site nuisance dust at the time the Notice of Violation was issued on June 17, 2014. There is also competent and substantial evidence that attempts to remediate the off-site dust were adequate in that Officer Davis testified without qualification that during dozens of inspections subsequent to the Notice of Violation he did not detect dust as being a further issue. Respondent

[14] Respondent argues that the definition of nuisance is so vague "as to make these ordinances undefinable, unenforceable and unconstitutional." The undersigned agrees with Escambia County that he does not have the authority to decide such issues regarding this or any other ordinance at issue.

violated Section 82-227(1)(b) in that it caused, suffered, allowed, or permitted the discharge into the air of dust so as to constitute a nuisance as defined by Section 82-225(cc). However, that violation has been remediated and is not ongoing. No fine will be assessed.

Violation 2 – Cover (Notice of Violation 6/17/2014)

Escambia County alleges Respondent's Rolling Hills C&DD facility has failed to provide bi-weekly cover in sufficient quantity in violation of Escambia County Code Sec. 82-227(1)(c), which states:

> General operating requirements for regional rural, infill, and transfer C&DD facilities and for land clearing debris facilities. The following minimum requirements must be met at all times by the operator or owner, as appropriate, of the facility: (1) Regional facilities. c. All working faces must be covered bi-weekly by cover sufficient in quantity to deprive debris of oxygen, minimize the risk of fire and prevent emission of objectionable odors. (emphasis supplied)

Respondent maintains that it applied bi-weekly cover in compliance with the ordinance. However, the ordinance requires more than just bi-weekly cover, it requires the cover be "sufficient in quantity to…prevent objectionable odors." It is the responsibility of the Respondent to ensure that the bi-weekly cover is sufficient to prevent the objectionable odor. The competent and substantial evidence of record demonstrates that objectionable odor from the facility was an ongoing nuisance, which indicates a failure to provide cover adequate to prevent the objectionable odor. This failure is also supported by the unrebutted photographic evidence as well as the inspections testified to by Officer Davis and Doyle Butler.

Respondent has violated Section 82-227(1)(c) by failing to apply, upon all working faces, bi-weekly cover sufficient in quantity to deprive debris of oxygen, minimize the risk of fire, and prevent emission of objectionable odors. That violation is ongoing.

Violation 3 – Effective Dust Suppression System (Notice of Violation 6/17/2014)

Escambia County alleges Respondent has failed to implement an effective dust suppression system in violation of Escambia County Code Section 82-227(1)(d), which states:

> General operating requirements for regional rural, infill, and transfer C&DD facilities and for land clearing debris facilities. The following minimum requirements must be met at all times by the operator or owner, as appropriate, of the facility: (1) Regional facilities. d. An effective dust suppression system must be provided. (emphasis supplied)

Competent and substantial evidence exists that the Rolling Hills facility had failed to implement an effective dust suppression system at the time the Notice of Violation was issued on June 17, 2014. There is also competent and substantial evidence that sometime following June 17, 2014, Respondent implemented dust suppression systems (as described in the testimony of Kevin Parsley cited above) that were effective in suppressing dust. As previously noted, Officer Davis testified without qualification that during dozens of inspections subsequent to the Notice of Violation he did not detect dust as being a further issue.

Respondent violated Section 82-227(1)(d) in that it failed to implement an effective dust suppression system. However, that violation has been remediated and is not ongoing. No fine will be assessed.

Violation 4 – LCD Facility (Notice of Violation 6/17/2014)

Escambia County alleges Respondent has failed to obtain a permit required to operate a Land Clearing Debris (LCD) facility in violation of Escambia County Code Section 82-228(a), which states:

> Permit required; fees and renewal. (a) No person shall operate a regional, rural, infill, or transfer C&DD or LCD facility until first obtaining an interim permit from the department of solid waste management. (emphasis supplied).

The competent and substantial evidence demonstrates that at the time of the June 17, 2014 Notice of Violation, Respondent was in violation of Section 82-228 in that it was receiving

LCD materials onto portions of its property which were not permitted to receive those materials and which were not otherwise covered by Respondent's C&DD permit.

Respondent argues Escambia County is estopped from enforcing the permitting requirements of Section 82-228 because Respondent applied for an LCD permit prior to August 21, 2014 in reliance on Section 82-229 of the Escambia County Code of ordinances which placed a moratorium on permitting or re-permitting C&DD and LCD facilities. The ordinance further provided in relevant part:

> If Escambia County receives a completed permit application and the necessary permit application fee for a CDD or LCD facility prior to the commencement of the moratorium, that CDD or LCD facility may operate during the moratorium, provided that all activities comply with applicable Escambia County codes, ordinances, and regulations. (emphasis supplied)

Respondent argues it acted in reliance on this provision which Respondent contends allowed it to operate a previously unpermitted LCD facility during the moratorium as long as it submitted its completed permit application and application fee prior to the commencement of the moratorium on August 21, 2014. The undersigned does not need to reach the issue of whether the ordinance allows the operation of a previously unpermitted facility during the moratorium. If the ordinance were a waiver of Section 82-228 permitting requirements during the moratorium, that waiver is expressly conditioned upon "all activities" complying "with applicable Escambia County codes, ordinances, and regulations."

One of the applicable ordinances is Section 82-227(5)(d) which required that Respondent "[a]pply covers at all appropriate times and not less than biweekly in sufficient quantity and type to deprive debris of oxygen, minimize the risk of fire and prevent emission of offensive odors to all active working faces" The unrebutted photographic evidence presented by the County demonstrates Respondent did not comply with Section 82-227(5)(d) by providing cover or by

providing cover in sufficient quantity. Furthermore, Respondent failed to sustain its affirmative defense of estoppel by providing evidence that it was in compliance with applicable ordinances and regulations including, without limitation, Section 82-227(5)(d).[15] Therefore, to the extent that Section 82-229 might have otherwise granted a right to perform unpermitted activities during the moratorium, Respondent forfeited that right by failing to comply with Section 82-227.

Respondent has violated Section 82-228 in that it has operated an LCD facility without first obtaining an interim permit from the Department of Solid Waste Management as required in the Escambia County Code of Ordinances.

Violations 5 and 6 (Notice of Violation 6/17/2014) and
Violation 1 (Notice of Violation 6/24/2014)

These violations were voluntarily dismissed by Escambia County and are hereby DISMISSED.

Violation 2 (Notice of Violation 6/24/2014)

Escambia County alleges Respondent has permitted the working or operational height of the C&DD mound to become visible offsite in violation of Escambia County Code Section 82-226, which states:

[15] Whether labeled as estoppel, waiver or otherwise, Respondent essentially raises an affirmative defense arguing that Escambia County was barred from enforcing the permitting requirements of Section 82-228 because of the rights alleged to have been granted by Section 82-229. Of course, the party raising an affirmative defense bears the sole burden of proof for that defense. E.g. *Custer Med. Ctr. v. United Auto. Ins. Co.,* 62 So. 3d 1086, 1096 (Fla. 2010)(holding that an affirmative defense is an assertion of facts or law by the defendant that, if true, would avoid the action and the plaintiff is not bound to prove that the affirmative does not exist; rather, the defendant has the burden of proving an affirmative defense). To sustain such a defense Respondent had to prove that it had met the requirements of Section 82-229 – i.e. that it had timely applied for a permit, paid its fee, and that its operations otherwise complied with all applicable County codes, ordinances, and regulations. Respondent failed to provide evidence that it was operating the unpermitted LCD operations in compliance with applicable codes and regulations. In fact, the competent and substantial evidence was to the contrary. Therefore, Respondent did not meet its burden of proving its affirmative defense.

> Classification of C&DD facilities. (1) Regional Facility. A regional facility must comply with the following: c. Aerial and vertical operational height shall be governed by ability to view from adjacent properties. At no time shall the working or operational height exceed the permitted height or be visible from beyond the property line including materials stored for future disposal or recycling.

The height of the C&DD mound could not exceed its permitted height nor could it be visible from beyond the property line. The competent and substantial evidence demonstrates Respondent violated Section 82-226 in that the height of its C&DD mound exceeded the height represented by Respondent in its permit application which is incorporated into the permit[16] and was also visible from beyond the property line.

Respondent has violated Section 82-226(1)(c) by allowing its working or operational height to exceed the permitted height or be visible from beyond the property line. That violation is ongoing.

Accordingly, it is ORDERED that:

Violations 1 and 2 (6/17/2014) and Violation 2 (6/24/2014)

Respondent shall have until **April 13, 2015** to correct Violations 1 (as to nuisance odor) and Violation 2 as set forth in the June 17, 2014, Notice of Violation and Violation 2 as set forth in the June 24, 2014, Notice of Violation and to bring the violations into compliance with the Escambia County Code of Ordinances. Corrective action shall include:

a. Preventing any further discharge of nuisance odor beyond the Respondent's property limits (Violation 1, 6/17/2014);

b. Covering all working faces bi-weekly with cover *sufficient in quantity* to deprive debris of oxygen, minimize the risk of fire and prevent emission of objectionable odors (Violation 2, 6/17/2014);

[16] The permit (Exhibit 5) specifically states "the facility shall be operated in accordance with the permit application…"

c. Reducing the height of the mound below the permitted height of 130 feet (Violation 2, 6/24/2014); and

d. Taking all necessary action to ensure the mound is not visible from beyond the property line (Violation 2, 6/24/2014);

Upon proper notification by any code enforcement officer to the special master that Respondent has failed to fully correct the violation within the time required, Respondent will be assessed a fine of **$200.00 per day** *for each uncorrected violation*, commencing **April 14, 2015**. This daily fine shall continue until the violations are abated and brought into compliance or until as otherwise provided by law. RESPONDENT IS REQUIRED, immediately upon its full correction of these violations (or upon full correction of any single violation), to contact the Escambia County Environmental Enforcement Office in writing to request that it immediately inspect the property to make an official determination of whether the violation(s) has been abated and brought into compliance. If a violation(s) is not abated by **May 14, 2015**, then the County is authorized to take whatever steps are necessary to abate the violation(s) for Respondent including, but not limited to:

a. Taking such measures as are necessary to prevent further discharge of nuisance odor beyond the Respondent's property limits;

b. Taking such measures as are necessary to cover all working faces bi-weekly with cover sufficient in quantity to deprive debris of oxygen, minimize the risk of fire and prevent emission of objectionable odors;

c. Taking such measures as are necessary to reduce the height of the mound below the permitted height of 130 feet;

d. Taking such measures as are necessary to ensure the mound is not visible from beyond the property line; and

e. Stopping the flow of truck traffic onto the site in continuance of disposal activity, if such action is required in order to facilitate abatement of the violations.

The reasonable cost of such abatement measures taken by the County will be assessed against Respondent and will constitute a lien on the property.

Violation 4 (6/17/2014)

Respondent shall immediately cease accepting land clearing debris onto unpermitted portions of its property and shall not accept such materials until it has obtained a permit as required by Section 82-228(a).

Code enforcement officers are authorized to take such reasonable measures as necessary to stop the flow of any truck traffic intended to deposit land clearing debris on an unpermitted portion of Respondent's property, until a permit has been obtained.

Should land clearing debris be accepted onto an unpermitted portion of Respondent's property in violation of this Order, code enforcement officers are authorized to record an affidavit attesting that such a violation has occurred and notify the special master of the same. Upon proper notification to the special master, there shall be a $500.00 fine assessed for each day a violation occurs.

A cost award in favor of Escambia County in the amount of $1100.00 is granted. This fine shall be forwarded to the Board of County Commissioners. Under the authority of §162.09(1), Florida Statutes, and §30-34(d), Code of Ordinances, the Board of County Commissioners will certify to the Special Master all costs imposed pursuant to this Order. All Monies owing hereunder shall constitute a lien on ALL YOUR REAL AND PERSONAL

PROPERTY, including any property involved herein, which lien can be enforced by foreclosure and as provided by law.

You have the right to appeal orders of the Special Magistrate to the Circuit Court of Escambia County. If you wish to appeal, you must give notice of such in writing to both the Environmental Enforcement Division at Escambia County Central Complex, 3363 West Park Place, Pensacola, Florida 32504 and the Escambia County Circuit Court no later than thirty (30) days from the date of this Order. Failure to file a timely Written Notice of Appeal will waive your rights to an appeal.

DONE and ORDERED this 13th day of March, 2015

R. Todd Harris

R. Todd Harris
Special Master
Office of Environmental Enforcement

Copies to:

All Counsel of Record
Clerk to the Special Master