BEFORE THE STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,	IN THE OFFICE OF THE NORTHWEST DISTRICT
Petitioner,	
v.	OGC FILE NO.: 17-0096
SOUTH PALAFOX PROPERTIES, LLC, a Florida Limited Liability Company,	
Respondent.	

NOTICE OF VIOLATION,
ORDERS FOR CORRECTIVE ACTION, AND ADMINISTRATIVE PENALTY ASSESSMENT

TO: Alexander L. Cover, III, Registered Agent & Managing Member;
John D. Levitan, Sr., and James W. Dillard, Managing Members
South Palafox Properties, LLC
997 South Palafox Street
Pensacola, Florida 32502

Sent via FedEx: 8488 1493 1329

Pursuant to the authority of Section 403.121(2), Florida Statutes ("F.S".) the State of Florida Department of Environmental Protection ("Department") gives notice to South Palafox Properties, LLC ("Respondent") of the following findings of fact and conclusions of law with respect to violations of Chapter 403, F.S.

FINDINGS OF FACT
PARAGRAPHS APPLICABLE TO ALL COUNTS

1. The Department is the administrative agency of the State of Florida having the power and duty to protect Florida's air and water resources and to administer and enforce the provisions of Chapter 403, F.S., and the rules promulgated thereunder in F.A.C. Title 62.

2. Respondent is an active Florida limited liability company, that owns and operates the Rolling Hills Yard Trash Disposal Center located at 6990 Rolling Hills Road, Pensacola, Escambia County, Florida 32505, and further identified by Escambia County Property Appraiser's Office Parcel Identification Number 26-1S-30-5105-002001 ("Facility"). The Department has assigned WACS ID No. 3133 to the Facility.

3. Respondent operates the Facility pursuant to Yard Trash Disposal Facility General Permit Number 003397-014-SO (YTD Permit attached hereto as Exhibit A).

4. On February 13, 2017, the Department was notified by Escambia County that the Facility was burning. On February 13, 2017, Department personnel verified the open burning by observing smoke and flames at the Facility. On February 15 and 17, 2017, Department personnel conducted follow-up visits and resolution of the violations was not apparent.

COUNT I
VIOLATION OF OPEN BURNING PROHIBITION

5. Paragraphs 1 through 4 are realleged and incorporated herein.

6. Respondent is not authorized by the Department to open burn solid waste at the Facility.

7. On February 13, 2017, Department personnel verified the open burning by observing smoke and flames at the Facility.

COUNT II

FAILURE TO ADEQUATELY RESPOND TO EMERGENCIES

8. Paragraphs 1 through 4 are realleged and incorporated herein.

9. On February 13, 2017, the Department notified the Respondent that the Facility was on fire. As of the date of this notice, Respondent has not provided the staff or equipment necessary to implement its emergency contingency plan.,

COUNT III

FAILURE TO CLOSE YARD TRASH DISPOSAL FACILITY

10. Paragraphs 1 through 4 are realleged and incorporated herein.

11. On March 13, 2015, Escambia County Office of Environmental Enforcement, Special Magistrate, issued an order prohibiting the Facility from accepting yard trash for disposal (copy of Order attached hereto as Exhibit B).

12. Since March 14, 2015, yard trash has not been received by the Facility.

13. On February 13, 2017, Department personnel observed that the Facility has not be closed.

COUNT IV

PERMIT REVOCATION

14. Paragraphs 1-9 are realleged and incorporated herein.

COUNT V

15. The Department has incurred expenses to date while investigating this matter in the amount of not less than $250.00.

CONCLUSIONS OF LAW

The Department has evaluated the Findings of Fact with regard to the requirements of Chapter 403, F.S. and F.A.C. Title 62. Based on the foregoing facts, the Department has made the following conclusions of law:

16. Respondent is a "person" within the meaning of Sections 403.031, F.S.

17. The Department is imposing an administrative penalty of less than or equal to $10,000.00 in this Notice of Violation as calculated in accordance with Section 403.121, Fla. Stat.

18. Facility is a “solid waste management facility” within the meaning of Subsection 62-701.200(112), F.A.C.

19. Respondent's operation is a Yard Trash Disposal facility as set forth in Sections 403.703(6) and (9), F.S., and Rules 62-701.200(29), (31), (56), and (135), F.A.C.

20. The facts related in Count I constitute a violation of Subsection 62-701.300(3), F.A.C., which states that open burning of solid waste is prohibited except in accordance with Chapter 62-256, F.A.C. The facts also constitute a violation of Section 403.161, F.S., which makes it a violation to fail to comply with Department rules.

21. The violation in Count I requires the assessment of administrative penalties under Section 403.121(3)(e), of $3,000 for unauthorized burning. Pursuant to Section 403.121(6), Fla. Stat., the Department is assessing the penalty for 4 of the days and counting that prohibited open burning has occurred, for a total of $12,000 in administrative penalties.

22. The facts related in Count II constitute a violation of Subsection 62-701.320(16),

F.A.C., which states that every permitted solid waste management facility shall have sufficient equipment to implement the contingency plan. The facts also constitute a violation of Section 403.161, F.S., which makes it a violation to fail to comply with Department rules.

23. The violation in Count II requires the assessment of administrative penalties under Section 403.121(4)(e), of $1,000 for failure to adequately respond to emergencies to bring an emergency situation under control. Pursuant to Section 403.121(6), Fla. Stat., the Department is assessing the penalty for 4 of the days and counting that the Respondent has failed to adequately respond to the emergency situation, for a total of $4,000 in administrative penalties.

24. The facts related in Count III constitute a violation of Subsection 62-701.803(8), F.A.C., which states that final cover and seeding or planting of vegetative cover shall be placed on each disposal unit within 180 days after final receipt of wastes. The facts also constitute a violation of Section 403.161, F.S., which makes it a violation to fail to comply with Department rules.

25. The violation in Count III requires the assessment of administrative penalties under Section 403.121(5), of $500 for failure to comply with any Departmental regulatory statute or rule requirement

26. The facts in Count IV constitute a violation of rule 62-4.530(4) FAC which provides that the Department may revoke a general permit issued by it if it finds that the permit holder or his agent has violated the law, Department, orders, rules or permit conditions. The Department is authorized to revoke the YTD Permit pursuant to Section 403.704(10) Florida Statutes.

27. The costs and expenses related in Count V are reasonable costs and expenses incurred by the State while investigating this matter, which are recoverable pursuant to Section 403.141(1) F.S.

28. The Department has assessed a total of $16,500 in civil penalties and $250 in department costs. However, the Department is capping the amount imposed to $10,000 pursuant to 403.121(2)(b).

ORDERS FOR CORRECTIVE ACTION

The Department has alleged that the activities related in the Findings of Fact constitute violations of Florida law. The Orders for Corrective Action state what you, Respondent, must do in order to correct and redress the violations alleged in this Notice.

The Department will adopt the Orders for Corrective Action as part of its Final Order in this case unless Respondent files a timely petition for a formal hearing or informal proceeding, pursuant to Section 403.121, F.S. (See Notice of Rights.) If Respondent fails to comply with the corrective actions ordered by the Final Order, the Department is authorized to file suit seeking judicial enforcement of the Department's Order pursuant to Sections 120.69, 403.121 and 403.131, F.S.

Pursuant to the authority of Sections 403.061(8) and 403.121, F.S., the Department proposes to adopt in its Final Order in this case the following specific corrective actions that will redress the alleged violations:

29. Respondent shall forthwith comply with all Department rules regarding solid waste management. Respondent shall correct and redress all violations in the time periods required below and shall comply with all applicable rules in F.A.C. Chapter 62-701.

30. Commencing immediately and henceforth, Respondent shall implement the emergency contingency plan and provide fire protection and fire-fighting capabilities adequate to control accidental burning of solid waste in the facility, as required by Subsection 62-701.320(16), F.A.C.

31. Within 90 days of the effective date of this Order, the Respondent shall complete closure of the Yard Trash Disposal Facility in accordance with Rule 62-701.803(8), F.A.C.

32. The Department has determined that based upon the violations provided herein, Permit Number 0003397-014-SO should be surrendered immediately.

33. Within 30 days of the effective date of this Order, Respondent shall make payment to the Department for costs and expenses in the amount of $10,250. Payment shall be made by cashier's check, money order or online payment. Cashier's check or money order shall be made payable to the "State of Florida Department of Environmental Protection" and shall include thereon the OGC Case number assigned to this case and the notation "Water Quality Assurance Trust Fund." The payment shall be sent to 160 West Government Street, Suite 308, Pensacola, Florida 32502-5740. Online payments by e-check can be made by going to the DEP Business Portal at: http://www.fldepportal.com/go/pay/ . It will take a number of days after this order becomes final and effective filed with the Clerk of the Department before online payment is available.

NOTICE OF RIGHTS

Respondent's rights to negotiate or litigate this action are described below. Please read them carefully.

Right to Negotiate

1. This matter may be resolved if the Department and Respondents enter into a Consent Order, in accordance with Section 120.57(4), Fla. Stat., upon such terms and conditions as may be mutually agreeable.

Right to Request a Hearing

2. Respondent has the right to a formal administrative hearing pursuant to Sections 120.569 and 120.57(1), F.S., if Respondent disputes issues of material fact raised by this Notice of Violation and Orders for Corrective Action ("Notice"). At a formal hearing, Respondent will have the opportunity to be represented by counsel or other qualified representative, to present evidence and argument on all issues involved, and to conduct cross-examination and submit rebuttal evidence.

3. Respondent has the right to an informal administrative proceeding pursuant to Sections 120.569 and 120.57(2), F.S., if Respondent does not dispute issues of material fact raised by this Notice. If an informal proceeding is held, Respondent will have the opportunity to be represented by counsel or other qualified representative, to present to the agency written or oral evidence in opposition to the Department's proposed action, or to present a written statement challenging the grounds upon which the Department is justifying its proposed action.

5. If Respondent desires a formal hearing or an informal proceeding, Respondent must file a written responsive pleading entitled "Petition for Administrative Proceeding" within 20 days of receipt of this Notice. The petition must be in the form required by F.A.C. Rule 28-106.2015 and include the following:

(a) The name, address, and telephone number, and facsimile number (if any) of each petitioner if the respondent is not represented by an attorney or qualified representative;

(b) The name, address, telephone number, and facsimile number of the attorney or qualified representative of respondent, if any, upon whom service of pleadings and other papers shall be made;

(c) A statement of when petitioner received the Notice;

(d) A statement requesting an administrative hearing identifying those material facts that are in dispute. If there are none, the petition must so indicate; and

(e) The notation "OGC Case No. 17-0096" shall be included in the request.

A petition is filed when it is received by the Department's Office of General Counsel, 3900 Commonwealth Boulevard, MS-35, Tallahassee, Florida 32399-3000.

Right to Request Mediation

6. Respondent may request mediation after filing a petition for hearing. Requesting mediation will not adversely affect the right to a hearing if mediation does not result in a settlement. The mediation will be held if the parties enter a written agreement, which is described below, within 30 days after receipt of the NOV. The mediation must be completed within 60 days of the agreement unless the parties otherwise agree.

The agreement to mediate must include the following:

(a) The names, addresses, and telephone numbers of any persons who may attend the mediation;

(b) The name, address, and telephone number of the mediator selected by the parties, or a provision for selecting a mediator within a specified time;

(c) The agreed allocation of the costs and fees associated with the mediation;

(d) The agreement of the parties on the confidentiality of discussions and documents introduced during mediation;

(e) The date, time, and place of the first mediation session, or a deadline for holding the first session, if no mediator has yet been chosen;

(f) The name of each party's representative who shall have authority to settle or recommend settlement; and

(g) The signatures of all parties or their authorized representatives.

As provided in section 120.573 of the Florida Statutes, the timely agreement of all parties to mediate will toll the time limitations imposed by sections 120.569 and 120.57 for requesting and holding an administrative hearing. Unless otherwise agreed by the parties, the mediation must be concluded within sixty days of the execution of the agreement. If mediation results in settlement of the administrative dispute, the Department must enter a final order incorporating the agreement of the parties. Persons whose substantial interests will be affected by such a modified final decision of the Department have a right to petition for a hearing only in accordance with the requirements for such petitions set forth above, and must therefore file their petitions within 21 days of receipt of this notice. If mediation terminates without settlement of the dispute, the Department shall notify the Respondent in writing that the administrative hearing processes under sections 120.569 and 120.57 remain available for disposition of the dispute, and the notice will specify the deadlines that then will apply for challenging the agency action and electing remedies under those two statutes.

Waivers

7. Respondent will waive the right to a formal hearing or an informal proceeding if a petition is not filed with the Department within 20 days of receipt of this Notice. These time limits may be varied only by written consent of the Department.

General Provisions

8. The allegations of this Notice together with the Orders for Corrective Action will be adopted by the Department in a Final Order if Respondent fails to timely file a petition for a formal hearing or informal proceeding, pursuant to Section 403.121,

F.S. A Final Order will constitute a full and final adjudication of the matters alleged in this Notice.

9. If Respondent fails to comply with the Final Order, the Department is authorized to file suit in circuit court seeking a mandatory injunction to compel compliance with the Order, pursuant to Sections 120.69, 403.121 and 403.131, F.S. The Department may also seek to recover damages, all costs of litigation including reasonable attorney's fees and expert witness fees, and civil penalties of not more than $10,000 per day for each day that Respondent has failed to comply with the Final Order.

10. This matter may be resolved if the Department and Respondent enter into a Consent Order, in accordance with Section 120.57(4), F.S., upon such terms and conditions as may be mutually agreeable.

11. The Department is not barred by the issuance of this Notice from maintaining an independent action in circuit court with respect to the alleged violations. If such action is warranted, the Department may seek injunctive relief, damages, civil penalties of not more than $10,000 per day, and all costs of litigation.

12. Copies of Department rules referenced in this Notice may be examined at any Department Office or may be obtained by written request to the person listed on the last page of this Notice.

DATED this 22nd day of February, 2017.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Emile D. Hamilton
Director of District Mgmt.

Copies furnished to:

Francine Ffolkes, OGC
Mail Station 35

Attachment A

Florida Department of Environmental Protection

Northwest District
160 W. Government Street, Suite 308
Pensacola, Florida 32502-5740

Rick Scott
Governor

Herschel T. Vinyard, Jr.
Secretary

May 30, 2013

Sent via e-mail to:
c.davidson@rollinghillscd.com

Mr. Charlie Davidson, Director
South Palafox Properties, LLC
6990 Rolling Hills Road
Pensacola, Florida 32505

Dear Mr. Davidson:

On May 17, 2013, the Florida Department of Environmental Protection (Department) received your Notification of Intent to Use a General Permit for a Yard Trash Disposal Facility known as Rolling Hills Yard Trash Disposal Center (DEP File Number 0003397-014-SO; Facility Identification No. 3133) located at 6990 Rolling Hills Road, Pensacola, Escambia County, Florida. The facility shall be operated in accordance with the provisions of Rules 62-701.803 and 62-4.540, Florida Administrative Code (F.A.C.) copies enclosed.

This General Permit is subject to the general conditions of Rule 62-4.540, F.A.C., and the requirements contained in Rule 62-701.803, F.A.C. These include, but are not limited to:

1. Controlling site access;
2. Managing stormwater;
3. Preventing the disposal of prohibited wastes;
4. Operating facility with 3 to 1 slopes and controlling odor;
5. Preventing waste disposed in water or wetlands;
6. Maintaining required setbacks from water and wetlands; and
7. Complying with all local laws and regulations.

Waste that may be accepted for disposal includes only yard trash debris as defined by Rule 62-701.200(135), F.A.C., and Chapter 403.703 paragraph 6(b) of the Florida Statutes.

Please use Facility Identification No. 3133 and DEP General Permit No. 0003397-014-SO on all correspondence concerning this facility. You should submit a completed Notice of Intent to Use a General Permit for a Yard Trash Disposal Facility 30 days prior to the expiration date of May 30, 2018, if you wish to continue disposal of yard trash debris after the general permit expiration date.

You can view this and other documents for your facility in the OCULUS database at the following link.

http://appprod.dep.state.fl.us/WWW_WACS/REPORTS/SW_Facility_Docs.asp?wacsid=3133

If you have any questions, please contact Dawn Templin, P.E., by phone at (850) 595-0644 or by e-mail at dawn.templin@dep.state.fl.us.

Sincerely,

J. C. Harp

J. Charles Harp
Program Administrator
Waste Management/Air Resources

JCH/dtm

Enclosures: Rule 62-701.803, F.A.C.
Rule 62-4.540, F.A.C.

c: Lee Martin, P.E., Solid Waste Management, lee.martin@dep.state.fl.us
Mike Keethler, P.E., Eviro-Pro-Tech, MKeethler@eptpensacola.com
Barry Long, P.G., Enviro-Pro-Tech, blong@eptpensacola.com
Brent Schneider, P.E., Escambia County, bdschneider@co.escambia.fl.us
Pat Johnson, Escambia County, ptjohnson@co.escambia.fl.us
Doyle Butler, Escambia County, dobutler@co.escambia.fl.us
Mark Markey, P.G., Gulf Power Company, RMMARKEY@southernco.com

62-701.803 General Permit for Off-site Disposal of Yard Trash.

(1) Notification. Notwithstanding the provisions of Rule 62-701.730, F.A.C., facilities that accept for disposal only yard trash may operate under a general permit pursuant to Part III of Rule 62-4, F.A.C., and this section. For purposes of this section, yard trash includes land clearing debris and unpainted, nontreated wood scraps and wood pallets that meet the definition of construction and demolition debris. The owner or operator of the yard trash disposal facility shall notify the Department in writing of the intent to use this general permit on Form 62-701.900(3), Notification of Intent to Use a General Permit for a Yard Trash Disposal Facility, http://www.flrules.org/Gateway/reference.asp?No=Ref-01483, effective date August, 2012, hereby adopted and incorporated by reference. Copies of this form are available from a local District Office or by writing to the Department of Environmental Protection, Solid Waste Section, MS 4565, 2600 Blair Stone Road, Tallahassee, Florida 32399-2400. Owners or operators of solid waste management facilities which have a permit under Chapter 62-701, F.A.C., to receive yard trash are exempt from this requirement. The notification shall include:

(a) A site plan, of a scale not greater than 200 feet to the inch, that shows the project location and identifies the proposed disposal areas, total acreage of the site and of the proposed disposal area, and any other relevant features such as water bodies, wetlands, or potable water wells within 100 feet of the site;

(b) Identification of ground water levels at the site, including the seasonal high ground water level if known;

(c) A general description of the facility operations, including equipment and personnel planned for the operation and closure of the facility, and a training plan which complies with the requirements of subsection 62-701.320(15), F.A.C.;

(d) A boundary survey and legal description, of the property;

(e) The planned active life of the facility, and the design height of the facility;

(f) Closure plans and cross section details of the final cover;

(g) The mailing address and phone number of the owner and operator; and

(h) Documentation that the applicant either owns the land or has legal authorization from the landowner to use the land for a disposal facility.

(2) Other requirements.

(a) The requirements of Rules 62-701.330 through 62-701.630, F.A.C., do not apply to yard trash disposal facilities, provided that none of the prohibitions contained in Rule 62-701.300, F.A.C., shall be violated.

(b) The owner or operator shall construct the facility only in accordance with the site plan submitted with the notification.

(c) The owner or operator shall operate the facility only in accordance with the descriptions and plans submitted with the notification.

(d) The external slopes of all disposal units shall be no greater than three feet horizontal to one foot vertical rise. The working face and internal slopes of all disposal units shall not be greater than three feet horizontal to one foot vertical rise unless reasonable assurance is provided in the notification that fires can be controlled in steeply sloped areas.

(e) The facility shall be operated to control objectionable odors in accordance with subsection 62-296.320(2), F.A.C. If objectionable odors are detected off-site, the owner or operator shall comply with the requirements of paragraph 62-701.530(3)(b), F.A.C.

(3) Temporary storage. The owner or operator shall make arrangements or shall have equipment for temporary storage, handling and transport to an authorized disposal or recycling facility for solid waste, other than yard trash, that is inadvertently accepted by the facility. Such solid waste that is accepted by the facility shall be segregated and disposed of in accordance with Department rules. Unless an alternate schedule is included in an operation plan submitted with the permit application, which provides for the control of odors and vectors, putrescible waste shall not be stored for longer than 48 hours and non-putrescible waste shall not be stored for longer than 30 days. Any hazardous waste that is received by the facility shall be managed in accordance with the provisions of Chapter 62-730, F.A.C.

(4) Compaction. Yard trash shall be compacted and sloped as necessary to assure that the requirements of subsection (8) of this section can be met.

(5) Access. Access to the disposal facility shall be controlled during the active life of the facility by fencing or other effective barriers to prevent disposal of solid waste other than yard trash.

(6) Inspection of waste. At least one spotter shall be on duty at the working face at all times that the site is operating to inspect the incoming waste. Any material other than yard trash shall be removed from the waste stream and placed into appropriate containers for disposal at a permitted facility. Spotters shall be trained in accordance with subsection 62-701.320(15), F.A.C.

(7) Inspections. Operation of a facility under a general permit constitutes consent for Department personnel to inspect the site and such records as are required by this section during normal business hours for compliance with Department rules.

(8) Closure. Final cover and seeding or planting of vegetative cover shall be placed on each disposal unit within 180 days after final receipt of wastes. Final cover shall consist of a 24-inch-thick soil layer, the upper six inches of which shall be capable of supporting vegetation and shall be graded to eliminate ponding, promote drainage, and minimize erosion. The side slopes of all above-grade disposal areas shall be no greater than three feet horizontal to one foot vertical rise.

(9) Notification of closure. The owner or operator shall notify the Department within 30 days after closing, covering, and seeding the facility as required in subsection (8) of this section.

(10) Incineration. A facility that employs an air curtain incinerator and that also stores or disposes of yard trash at the site shall meet the permitting requirements of Rule 62-256.500, F.A.C., as well as this section.

(11) A general permit issued under this section shall be valid for five years.

Rulemaking Authority 403.704, 403.707, 403.814 FS. Law Implemented 403.707, 403.814 FS. History–New 8-2-89, Amended 1-6-93, 1-2-94, 5-19-94, Formerly 17-701.803, Amended 12-23-96, 4-23-97, 5-27-01, 1-6-10, 8-12-12.

62-4.540 General Conditions for All General Permits.

(1) The terms, conditions, requirements, limitations, and restrictions set forth in this Part are "general permit conditions" and are binding upon the permittee. The conditions are enforceable under Chapter 403, F.S.

(2) The general permit is valid only for the specific activity indicated. Any deviation from the specified activity and the conditions for undertaking that activity shall constitute a violation of the permit. The permittee is placed on notice that violation of the permit may result in suspension or revocation of the permittee's use of the general permit and may cause the Department to begin legal proceedings.

(3) The general permit does not convey any vested rights or any exclusive privileges. It does not authorize any injury to public or private property nor any invasion of personal rights. It does not authorize any infringement of federal, state or local laws or regulations. It does not eliminate the necessity for obtaining any other federal, state or local permits that may be required, or allow the permittee to violate any more stringent standards established by federal or local law.

(4) The general permit does not relieve the permittee from liability and penalties when the construction or operation of the permitted activity causes harm or injury to human health or welfare; causes harm or injury to animal, plant or aquatic life; or causes harm or injury to property. It does not allow the permittee to cause pollution in contravention of Florida Statutes and Department rules.

(5) The general permit conveys no title to land or water, nor does it constitute State recognition or acknowledgment of title. It does not constitute authority for reclamation of submerged lands. Only the Board of Trustees of the Internal Improvement Trust Fund may express State opinion as to title.

(6) No general permit shall authorize the use of state owned land without the prior consent of the Board of Trustees of the Internal Improvement Trust Fund pursuant to Section 253.77, F.S.

(7) The general permit may be modified, suspended or revoked in accordance with Chapter 120, F.S., if the Secretary determines that there has been a violation of any of the terms or conditions of the permit, there has been a violation of state water quality standards or state air quality standards, or the permittee has submitted false, incomplete or inaccurate data or information.

(8) The general permit shall not be transferred to a third party except pursuant to Rule 62-4.120, F.A.C.

(9) The general permit authorizes construction and, where applicable, operation of the permitted facility.

(10) The permittee agrees in using the general permit to make every reasonable effort to conduct the specific activity or construction authorized by the general permit in a manner that will minimize any adverse effects on the adjacent property or on public use of the adjacent property, where applicable, and on the environment, including fish, wildlife, natural resources of the area, water quality or air quality.

(11) The permittee agrees in using the general permit to allow a duly authorized representative of the Department access to the permitted facility or activity at reasonable times to inspect and test upon presentation of credentials or other documents as may be required by law to determine compliance with the permit and the department rules.

(12) The permittee agrees to maintain any permitted facility, or activity in good condition and in accordance with the plans submitted to the department under subsection 62-4.530(1), F.A.C.

(13) A permittee's use of a general permit is limited to five years. However, the permittee may request continued use of the general permit by notifying the department pursuant to subsection 62-4.530(1), F.A.C. However, the permittee shall give notice of continued use of a general permit thirty days before it expires.

Specific Authority 403.814(1) FS. Law Implemented 253.123, 253.124, 403.061, 403.087, 403.088, 403.702-.73, 403.814, 403.851-.864 FS. History–New 7-8-82, Formerly 17-4.54, Amended 8-31-88, Formerly 17-4.540.

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:
>
> (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