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STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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DIVISION OF ADMINISTRATIVE HEARINGS

AP

CITY OF JACKSONVILLE,

Petitioner,

vs.

DEPARTMENT OF ENVIRONMENTAL PROTECTION and KIMMINS RECYCLING CORPORATION,

Respondents.

OGC CASE NO. 01-0067
DOAH CASE NO. 01-0783

CAS-CWS

## FINAL ORDER

An Administrative Law Judge with the Division of Administrative Hearings (hereafter "DOAH") submitted his Recommended Order to the Department of Environmental Protection (hereafter "Department") in this proceeding. The Recommended Order indicates that copies were served upon counsel for the Petitioner, City of Jacksonville (hereafter "City"), and the Co-Respondent, Kimmins Recycling Corporation (hereafter "Kimmins"). A copy of the Recommended Order is attached hereto as Exhibit A. Exceptions to the Recommended Order were filed on behalf of the City, and Responses to the City's Exceptions were filed on behalf of Kimmins. The matter is now before the Secretary of the Department for final agency action.

## BACKGROUND

On December 12, 2000, Kimmins filed a Notification of Intent to Use a General Permit to Construct and Operate a Solid Waste Transfer Station (the "General Permit") pursuant to Rules 62-4.530 and 62-701.801, Florida Administrative Code ("F.A.C.")

(2000).[1] The proposed location of the solid waste transfer station is 140 Stockton Street in the City (the "Facility"). This proposed Facility site is between McDuff Avenue to the west and Interstate 95 to the east, and between Beaver Street to the north and Interstate 10 to the south. The proposed service area for the Facility extends from south of Savannah, Georgia, to Dade City, Florida, in an arch passing through Odom and Valdosta, Georgia, and southward through Chiefland, Florida.

On December 22, 2000, Kimmins published the requisite newspaper notice of its intent to use the General Permit. The Department did not object to the use of the General Permit by Kimmins, provided several changes to the Facility requested by the Department were made. It is undisputed that Kimmins has agreed to make these changes requested by the Department. The City subsequently filed a timely request for an administrative hearing challenging Kimmins' use of the General Permit to construct and operate the Facility. The Department then referred the matter to DOAH, and Administrative Law Judge, Charles A. Stampelos ("ALJ"), was assigned to preside over the case. A formal hearing was held before the ALJ in the City on June 14-15, 2001.

## RECOMMENDED ORDER

On September 6, 2001, the ALJ entered his Recommended Order in this formal administrative proceeding. The ALJ concluded that the evidence presented at the hearing established that Kimmins had provided reasonable assurance that the construction and operation of the Facility would comply with the General Permit rule requirements. The ALJ thus recommended that a final order be entered by the

[1] Rule 62-701.801, F.A.C. (2000), was repealed effective May 7, 2001, shortly before the DOAH final hearing was held in this case. However, all the parties agreed in their Joint Prehearing Stipulation that the former provisions of Rule 62-701.801, F.A.C. (2000), were still applicable to this administrative proceeding. In the remainder of this Final Order, the term "Rule 62-701.801" shall be used to refer to Rule 62-701.301, F.A.C. (2000).

Department in this proceeding determining that the proposed Facility qualifies for the General Permit under Rule 62-701.801.

## RULINGS ON THE CITY'S EXCEPTIONS

Exception Nos. 1-5

These five miscellaneous Exceptions of the City object to the ALJ's Finding of Fact Nos. 15, 17, 19, 25-27, and 79. The City essentially disagrees with the ALJ's interpretations of, and inferences drawn from, the testimony presented at the DOAH final hearing. Nevertheless, it is the function of the ALJ, as the finder of the facts in a formal administrative proceeding, "to consider all the evidence presented, resolve conflicts, judge the credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent substantial evidence." Goin v. Commission of Ethics, 658 So.2d 1131, 1138 (Fla. 1st DCA 1995); Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). I have no authority to reweigh the evidence presented at the DOAH final hearing or to substitute my judgment for that of the ALJ as to the credibility of the witnesses. Belleau v. Dept. of Environmental Protection, 695 So.2d 143, 145 (Fla. 1st DCA 1997).

I conclude that the challenged factual findings of the ALJ are based on competent substantial evidence of record and must be adopted in this Final Order. See subsection 120.57(1)(l), Florida Statutes (2000). Accord Florida Dept. of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987). The supporting competent substantial evidence of record in this case includes the expert testimony at the DOAH final hearing of Hugh Gauntt, Gregory Mathes, Juanita Clem, and Carolyn McCreedy. Consequently,

in the course of preparing this Final Order, I am bound by the ALJ's Findings of Fact 15, 17, 19, 25-27, and 79. Id. at 1123.

Based on the above rulings, the City's Exceptions 1-5 are denied.

Exception No. 6

The City's sixth Exception objects to Conclusions of Law 138-148, wherein the ALJ concluded that Kimmins had provided sufficient proof in this case that the proposed Facility would comply with Rule 62-701.801 and the related provisions of Rule 62-4.530, F.A.C. In my view, this Exception raises the primary issue in this case, i.e., the burden of proof in an administrative proceeding where a third party is challenging the use of a general permit granted by Department rule as authority for a proposed activity within this agency's regulatory jurisdiction.

The Department is authorized by § 403.814(1), Florida Statutes, to adopt rules establishing general permits for categories of projects which have minimal adverse environmental impacts. It is undisputed that Rule 62-701.801 was duly adopted by the Department pursuant to § 403.814(1). Unlike some other Department permits, general permits are not "issued." General permit are established by rule adoption and the rule, itself, grants the general permit. See, e.g., Rules 62-4.520 and 62-701.801(1). Accord D'antoni v. Boston, 22 FALR 2879, 2881 (FLA. DEP 2000); Safe Harbor Enterprises, Inc. v. Robbie's Safe Harbor Marine Enterprises, Inc., 21 FALR 2318, 2323 (Fla. DEP 1999); City of Newberry v. Watson Construction Company, Inc., 19 FALR 2052, 2055 (Fla. DEP 1996).

A general permit rule authorizes persons to undertake an activity, if the activity comes within the parameters of and complies with the criteria and conditions of the rule

establishing the general permit. Safe Harbor Enterprises, Inc., 21 FALR at 2323. If an administrative petition is filed challenging the use of a general permit for a proposed facility, then the following burdens of proof apply:

1. The person relying on the general permit rule has the initial burden of going forward and presenting evidence constituting a preliminary showing of compliance with the specific rule provisions at issue; and evidence of compliance with every other Department standard or rule which might be possibly impacted is not required. City of Newberry, 19 FALR at 2058.

2. The burden of proof then shifts to the permit challenger to demonstrate that the person relying on the general permit is not likely to comply with the general permit rule provisions at issue or with other air or water quality standards incorporated by reference therein. Id. at 2058. This shifting evidentiary burden on the general permit challenger is in accord with the rationale of the court in the landmark case of Florida Dept. of Transportation v. J.W.C. Co., Inc., 396 So.2d 778 (Fla. 1st DCA 1981). In its J.W.C. Co., Inc. opinion, the court ruled that, once a permit applicant has made a preliminary showing of "reasonable assurances" that applicable Department standards will not be violated, the evidentiary burden then shifts to the permit challenger to prove that the applicant is not entitled to the permit. Id. at 396 So.2d 789.

I do disagree and reject the ALJ's rule interpretation in Conclusion of Law 140 that Part I of Chapter 62-4, F.A.C., does not contain any rule provisions applying to

general permits.[2] For instance, the processing fee provisions of Rules 62-4.050(4)(c)13, 62-4.050(4)(h), and 62-4.050(4)(p), F.A.C., all contain references to general permits. Nevertheless, I view this erroneous rule interpretation to have no effect on the ultimate disposition of this proceeding, and it is deemed to be "harmless error."

In the first sentence of Conclusion of Law 147, the ALJ interprets Department Rule 62-4.530(2) "to require that the party challenging the proposed use of a general permit must make some showing of a reasonable expectation that one of the prohibited actions would occur." When read in conjunction with the ALJ's Conclusion of Law 138,[3] I construe the ALJ's interpretation of Rule 62-4.530(2) to mean that such "showing of a reasonable expectation that one of the prohibited actions would occur" is required after the party relying on a general permit has initially presented evidence sufficient to make a preliminary showing of compliance with the general permit rule provisions relied upon.

In this administrative proceeding, the ALJ concluded that Kimmins did meet its initial burden of going forward with evidence and making a preliminary showing of "reasonable assurances" that the proposed Facility will comply with the general permit provisions of Rule 62-701.801 and the related provisions of Rule 62-4.530. The ALJ also concluded that the City subsequently failed to meet its shifting evidentiary burden

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[2] The rules in Ch. 62-4, F.A.C., dealing with permits, were adopted and are enforced by the Department. Thus, the Department has the principal responsibility of interpreting these rules, which are within this agency's regulatory jurisdiction and expertise. Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987, 989 (Fla. 1985); Florida Public Employee Council, 79 v. Daniels, 646 So.2d 813, 816 (Fla. 1st DCA 1994). I find that my interpretation of Ch. 62-4 is more reasonable than that of the ALJ.

[3] In Conclusion of Law 138, the ALJ correctly concludes that Kimmins has the initial burden of presenting evidence of compliance with the specific rules [granting the general permit], and then the burden shifts to the City to demonstrate that Kimmins is not likely to comply with these rule provisions.

of demonstrating that the proposed Facility may be reasonably expected to violate the general permit provisions of Rule 62-701.801 and Rule 62-4.530.

With the exception of the rule interpretation of Ch. 62-4 rejected above, I otherwise agree with the remainder of the ALJ's rule and statutory interpretations in Conclusions of Law 138-148. I also determine that these legal conclusions and rule interpretations of the ALJ's in Conclusions of Law 138-148 are supported by the cumulative expert testimony at the final hearing of Hugh Gauntt, Gregory Mathes, Juanita Clem, and Carolyn McCreedy. All of these expert witnesses called by Kimmins gave opinion testimony that the proposed Facility will be able to comply with the applicable general permit rule provisions relating to the construction and operation of solid waste transfer stations.[4]

In contrast, the City only presented one witness, Chris Pearson, who gave expert testimony that the proposed Facility would not likely comply with the general permit rule provisions relating to solid waste transfer stations. In its J.W.C. Co. opinion, the court observed that a permit challenger must present "contrary evidence of equivalent quality" to that presented by the permit applicant. Id. at 396 So.2d 789. A review of the DOAH transcript in this case makes it understandable why the ALJ might have given more weight to the cumulative testimony of the four expert witnesses called by Kimmins than to the testimony of the expert witness presented by the City.

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[4] Mr. Gauntt, a licensed professional engineer with over 25 years of experience in geotechnical and solid waste engineering, was accepted by the ALJ to testify as an expert in solid waste transfer design and permitting. Mr. Mathes, with 20 years of experience in the solid waste business, was accepted to testify as an expert in solid waste management. Ms. Clem, a licensed professional engineer and former Department employee, was accepted to testify as an expert in solid waste and stormwater design and permitting. Ms. McCreedy, a civil and environmental engineer who is also a certified landfill operator, was accepted to testify as an expert in solid waste facility permitting and solid waste management.

In addition, the decision to accept one expert's testimony over that of another is a matter within the sound discretion of the ALJ and cannot be altered by a reviewing agency, absent a complete lack of competent substantial evidence of record from which the finding could be reasonably inferred. See, Collier Medical Center v. State, Dept. of HRS, 446 So.2d 83, 85 (Fla. 1st DCA 1985); and Florida Chapter of Sierra Club v. Orlando Utilities Commission, 436 So.2d 383, 389 (Fla. 5th DCA 1983). As discussed above, I have determined that the cumulative testimony of Kimmins' four expert witnesses constitutes competent substantial evidence supporting the ALJ's challenged factual findings and legal conclusions in the Recommended Order on review.

In view of the above rulings, the City's Exception No. 6 is denied.

Exception No. 7

This Exception of the City again objects to the ALJ's Conclusions of Law 142, 143, 148, and adds an objection to Conclusion of Law 153. The City's repeated objections to the ALJ's Conclusion of Law 142, 143, and 148 are rejected for the reasons set forth in my preceding rulings denying the City's sixth Exception. In addition, I find no error in the ALJ's statutory construction of subsection 403.021(8), Florida Statutes, as set forth in his Conclusions of Law 142, 143 and 153.

The ALJ concluded that the provisions of subsection 403.021(8), Florida Statutes, are not applicable to this proceeding challenging the use of a general permit to construct and operate a solid waste transfer station. The ALJ correctly noted that the language used by the Legislature in subsection 403.021(8) refers to the Department's duty "in reviewing applications for permits . . . to consider the total well-being of the public."

As discussed above, no applications for issuance of permits are filed with or reviewed by the Department when persons or entities are relying on general permit rules as authority for proposed activities or projects. The general permits are granted by the rules relied upon, provided that the proposed projects comply with the respective rule conditions. If the Legislature had intended for general permits to be included within the purview of subsection 403.021(8), then it would have been a simple matter to have inserted the term "general permits" in this portion of the statute.

Moreover, the ALJ also observed that subsection 403.021(8) expressly states that consideration of the total well-being of the public is required only "if there may be a danger of a public health hazard." The ALJ ruled in Conclusion of Law 143 that no evidence was presented in this case establishing a potential public health hazard due to the construction and operation of the proposed solid waste transfer station by Kimmins. Upon review of the DOAH record in this case, I agree with this conclusion of the ALJ.

Accordingly, the City's Exception No. 7 is denied.

Exception No. 8

The City's eighth and final Exception objects to Conclusion of Law 152, wherein the ALJ rejects the City's contention that operation of the proposed Facility would create "objectionable odors" in violation of Rule 62-296.320, F.A.C. I also reject this "objectionable odors" contention on several grounds. First, the ALJ expressly concluded in his prior Conclusion of Law 150 that Rule 62-296.320 is not applicable in this general permit administrative challenge. Second, the ALJ also concluded in his prior Conclusion of Law 151 that the City did not demonstrate that the steps proposed by Kimmins to prevent objectionable odors from occurring are so inadequate as to

constitute a failure to take reasonable precautions to prevent violations of the emissions standards set forth in Rule 296.320(4)(c), F.A.C.

Neither Conclusion of Law 150 nor Conclusion of Law 151 was objected to by the City, and these legal conclusions of the ALJ arrive on agency review with a presumption of correctness. Finally, I agree with the ALJ's related conclusion that the City failed to demonstrate at the final hearing that the operation of the Facility would likely create odors so noxious as to be injurious to human health or to unreasonably interfere with the use and enjoyment of property by other persons others in the vicinity of the proposed Facility site.

The City's Exception No. 8 is thus denied.

## CONCLUSION

In his unchallenged Conclusion of Law 160, the ALJ noted that the City's primary objection to the proposed solid waste transfer station was "that it is to be located too close to a residential neighborhood." The ALJ concluded, however, that the City's concerns over potential odors, noises, pests, and contamination in the surrounding neighborhood due to the operation of the Facility have been adequately addressed by Kimmins in this administrative proceeding.

The ALJ further concluded in his unchallenged Conclusion of Law 161 that Kimmins has provided reasonable assurances that its proposed Facility meets all the requirements of the General Permit for Solid Waste Stations set forth in Rule 62-701.801. These two significant conclusions of law of the ALJ not objected to by the City support a determination in this Final Order that Kimmins is entitled to rely on the general permit granted in Rule 62-701.801 for the construction and operation of the Facility.

It is therefore ORDERED that:

A. The Recommended Order, with the modification of Conclusion of Law 140, is otherwise adopted and incorporated by reference in this Final Order.

B. Kimmins' proposed solid waste transfer Facility qualifies for the General Permit for Solid Waste Stations set forth in Department Rule 62-701.801.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 18th day of October, 2001, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

DAVID B. STRUHS
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

CLERK

10/18/01
DATE

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service to:

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Ann Cole, Clerk and
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and by hand delivery to:

W. Douglas Beason, Esquire
Department of Environmental Protection
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Tallahassee, FL 32399-3000

this 11th day of October, 2001.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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