

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LOUIS A. GERACE, et al.,	)	
	)	Case Nos. 02-3639--02-3640
Petitioners,	)	02-3817--02-3819
	)	02-3823--02-3827
vs.	)	02-3829--02-3836
	)	02-3838--02-3839
S.M.G., INC. and DEPARTMENT OF	)	02-3860--02-3863
ENVIRONMENTAL PROTECTION,	)	02-3865--02-3875
	)	02-3877--02-3880
Respondents.	)	
_____	)	

RECOMMENDED ORDER

Notice was given, and on February 27-28, 2003, a final hearing was held in this case. Pursuant to the authority set forth in Sections 120.569 and 120.57(1), Florida Statutes, the hearing was conducted by Charles A. Stampelos, Administrative Law Judge, in Crystal River, Florida.

APPEARANCES

For Petitioners: Morris Harvey, Qualified Representative  
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For Respondent S.M.G., Inc.:

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For Respondent Department of Environmental Protection:

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STATEMENT OF THE ISSUE

The issue presented is whether Respondent, S.M.G., Inc. (SMG), has provided reasonable assurance that its existing air curtain incinerator will be operated in accordance with applicable statutory and rule provisions.

PRELIMINARY STATEMENT

On May 23, 2001, SMG submitted an application for an air construction permit for the construction of an air curtain incinerator in Citrus County, Florida. On July 9, 2001, the Department of Environmental Protection (Department) gave notice of its intent to issue a permit (Permit No. 0170360-001-AC) to SMG for the construction of an air curtain incinerator. Notice of the proposed agency action was published in the Citrus Times on July 19, 2001, and no petitions challenging the issuance of the construction permit were filed within 14 days of publication of the notice. The air construction permit became final on or about August 6, 2001.

On June 19, 2002, the Department gave notice of its intent to issue a permit to SMG for the operation of the air curtain

incinerator in Citrus County, Florida, Permit No. 0170360-002-AO.

On August 15, 2002, the Department issued a notice of permit amendment to SMG to the previously issued air operating permit in order to incorporate certain solid waste management provisions into the air operating permit. This amended permit is identified as Permit No. 0170360-002-AO; FDEP Project No.: 003.

In August 2002, the Petitioners filed separate, but virtually identical petitions with the Department, challenging both the air construction and air operating permits.

In September 2002, the Petitioners filed a second set of individual petitions challenging the amendment to the air operating permit.

While all of the petitions were pending before the Department, SMG filed motions to dismiss both the original petitions and the second round of petitions. In September 2002, the Department referred all of the petitions to the Division of Administrative Hearings (Division) for the assignment of an administrative law judge to conduct a hearing.

After the petitions were referred to the Division, on October 11, 2002, an Order was issued allowing each petitioner to file a response to the motions to dismiss or allowing

Petitioners to elect to file joint responses with other  
Petitioners.

Thereafter, the Petitioners filed one response to the  
motions to dismiss. All of the Petitioners agreed to rely on  
the response filed on their behalf by Morris Harvey, a  
Petitioner in DOAH Case Nos. 02-3869 and 02-3835. (Ultimately,  
Mr. Harvey appeared as a qualified representative on behalf of  
all of the Petitioners.)

On October 29, 2002, an Order was issued granting the  
motions to dismiss. Petitioners were allowed to file amended  
petitions.

On November 14, 2002, Petitioners filed one Amended  
Petition, which superceded all previous petitions filed in the  
above-styled proceeding.

On December 9, 2002, SMG filed a Motion for Order  
Relinquishing Jurisdiction requesting a final order dismissing  
the Amended Petition. SMG contended that there were no disputes  
of material fact regarding whether Petitioners timely filed  
their challenges to the air construction permit issued by the  
Department.

On December 18, 2002, an Order was issued relinquishing  
jurisdiction to the Department for further proceedings regarding  
only that portion of the Amended Petition challenging the  
issuance of the construction permit. It was specifically

determined that there were no apparent disputes of material fact regarding whether the original petitions, challenging the issuance of the construction permit, were timely filed. Given the undisputed facts of record, it was determined that the initial petitions, challenging the issuance of the construction permit, were untimely filed, hence, the Order relinquishing jurisdiction to the Department.

On December 19, 2002, SMG filed a motion to dismiss all remaining challenges pending before the Division.

On January 2, 2003, an Order was entered granting the motion to dismiss as to Petitioners' challenges to the amendment to the operating permit because the Amended Petition did not allege any substantial interest that would be effected by the permit amendment. However, the Order denied the motion to dismiss as to the challenges to the operating permit. The Order provided that a recommended order of dismissal of the challenge to the permit amendment would be made in the recommended order following the final hearing. In accordance with the prior orders issued, the only issues to be decided at the final hearing are the challenges to the air operating permit and it is recommended that Petitioners' challenge to the amended permit be dismissed.

On February 10, 2003, SMG filed a motion requesting relinquishment of jurisdiction to the Department. SMG contended

that all remaining challenges to the operating permit should be dismissed. The Department and the Petitioners opposed the motion. The motion was denied.

The final hearing on the air operation permit was held on February 27-28, 2003, in Crystal River, Florida, having been continued from the previously scheduled hearing dates of January 16-17, 2003.

Prior to the commencement of the evidentiary portion of the final hearing, approximately 13 of the Petitioners who attended the hearing, advised, under oath, that they authorized Mr. Harvey (and Leonard Kaplan) to appear as their qualified representative in this proceeding. Mr. Harvey represented that he was representing all of the Petitioners and the representation was accepted and Mr. Harvey was authorized to appear as a qualified representative to appear on behalf of all Petitioners.

At the final hearing, SMG presented the testimony of Sean Gerrits, the President of SMG, and Byron E. Nelson, an environmental engineer and President of Southern Environmental Services, Inc. SMG Exhibits 1 through 11, and 13 through 16, and SMG's demonstrative Exhibits 2 through 7 were admitted into evidence. SMG also adopted the testimony of James L. McDonald.

The Department presented the testimony of James L. McDonald, an air permitting engineer with the Southwest District

Office of the Department. The Department Exhibits 1 and 2 were admitted in evidence. The Department also adopted the testimony of Mr. Gerrits.

Petitioners presented the testimony of Annette Pierce, Sister Carol A. Vinci, Marlene Holland, James LaGuidice, Julia Washington, Elmore Futscher, Martha Futscher, Leonard Kaplan, Dorothy Hazzard, Sharlene Rubin, Anthony Washington, and Morris Harvey, all Petitioners, and the testimony of Robert E. Soich, Jr., air compliance inspector for the Southwest District Office of the Department. Petitioners' Exhibits 1 through 9, 11 through 16, F1, F1-D.H., F1-A.P., F1-M.F., F1-S.C.V., F1-S.R., and F1-A.W., were admitted into evidence.

On rebuttal, SMG offered the testimony of Kathy Warrington, Alexander Ilnyckuj, Alan Jefferson, Reverend Chris Brown, John Hamilton, Andrea J. Jacomet, David Stevens, Charles Head, Steve Moore, and Randy Morgan.

The four-volume Transcript of the final hearing was filed with the Division on March 19, 2003. The parties timely filed proposed recommended orders, and each has been considered in preparing this Recommended Order.

#### FINDINGS OF FACT

##### The Parties

1. The Department is the state agency responsible for receiving applications for, and the issuance of, permits for the

construction and operation of air curtain incinerators in the State of Florida.

2. SMG is a contracting company, with residential, trucking, agricultural, and commercial driver's license divisions. SMG is the applicant for a permit to operate an air curtain incinerator.

3. Petitioners reside in Citrus County, Florida, in the vicinity of the constructed and operational air curtain incinerator. For the most part, Petitioners reside northeast, east, or southeast of the site. The Petitioners demonstrated their standing in this proceeding.

#### SMG's Construction Permit

4. On May 23, 2001, SMG submitted an application for an air construction permit to the Department's Southwest District Office. The application sought authorization to construct an air curtain incinerator "[o]n the east or west side of 6844 N. Citrus Avenue, Crystal River," Citrus County, Florida.<sup>1</sup>

5. The general purpose of pursuing this permit was to burn wood waste.

6. On July 9, 2001, the Department issued SMG a Notice of Intent to Issue the Proposed Air Construction Permit (Permit No. 0170360-001-AC). A copy of the Notice of Intent was published in the Citrus Times in Citrus County on July 19, 2001.



7. On August 6, 2001, the Department issued SMG an air construction permit for the proposed air curtain incinerator. The construction permit authorized the construction of a McPherson Systems, Inc. - Model M30E air curtain destructor (incinerator) with under fire air at a natural non-Title V facility.

8. Pursuant to the terms of the construction permit, in November 2001, SMG constructed an air curtain incinerator on approximately 500 acres of land on the east side of State Route 495 north of Crystal River in Citrus County, Florida, on property owned by the Gerrits family. See Endnote 1.

9. Pursuant to the construction permit, SMG installed a McPherson Systems, Inc. - Model M30E air curtain incinerator with under fire air, a refractory lined burning pit, three upper chamber refractory lined walls (ten feet high), and a stainless steel spark arrester screen. The manifold blower and under fire air fans are powered by an electric engine.

10. The manufacture designs and specifications for the McPherson model were submitted with the application for the air construction permit and admitted in evidence.

11. Construction of a portable air curtain incinerator with a blower/fan system powered by a diesel-fired engine was contemplated by the air construction permit. Although cheaper, SMG instead chose to install the McPherson model that would

produce the cleanest burn, i.e., one with fewer emissions, that was operated by electricity.

12. The McPherson model used by SMG is recognized as an efficient, reliable model of air curtain incinerator.

13. The diesel-fired blower/fan/engine system contemplated by the construction permit is considered exempt from permitting.

14. An engine operated by electricity has no emissions and therefore does not require an air permit from the Department.

15. The Department could not require a permit for the blower/fan system alone.

16. The operating permit supercedes the construction permit, except as amended.

#### Testing after Construction of the Incinerator

17. On November 23, 2001, SMG began operating the air curtain incinerator.

18. Pursuant to Special Condition 22 of the air construction permit, an initial visible emissions (VE) (opacity test) compliance test was performed on November 23, 2001, by Bernard A. Ball, Jr., an environmental engineer with Southern Environmental Services, Inc. The results of the initial VE compliance test were within the opacity limits contained in the construction permit.

19. Specific Condition 19 of the construction permit requires SMG to maintain daily operating logs of the air curtain incinerator's daily operations.

20. In order to obtain an air operating permit, a permit applicant is required to demonstrate compliance with the Department's rules and with the conditions of the construction permit. The Department requires an applicant for an operating permit to submit copies of recent daily operating records for the facility and copies of the emissions test required by the construction permit. These operating records are submitted in order for the Department to determine whether the applicant is complying with the applicable emissions standards and that the applicant is, in fact, maintaining the required operating logs as required by the construction permit.

21. In order for SMG to obtain the operating permit for the incinerator, Specific Condition 28 of the construction permit required SMG to file an application for an air operating permit with the Department within 45 days of testing and required the application to include a copy of the VE test report and copies of at least two recent weeks of daily operating logs.

22. On March 14, 2002, a second VE test was conducted by Mr. Ball, which also indicated that emissions were within the construction permit's opacity limits.

23. On April 1, 2002, SMG submitted its application for the air operation permit to the Department. The application was signed by Sean Gerrits, and contained copies of the VE test reports for the November 2001 and March 2002 tests, as well as three and one-half months of daily operating logs, certificates showing that the incinerator operators were trained, and photographs of the incinerator in operation. SMG submitted the documentation required under the construction permit.

24. On April 19, 2002, Robert E. Soich, Jr., air compliance inspector for the Department's Southwest District Office, performed an unannounced inspection and conducted a VE test in response to a complaint by Mr. Leonard Kaplan (a Petitioner), complaining of odors present. Excessive visible emissions were observed by Mr. Soich on April 19, 2002. The incinerator did not pass the VE test because of the improper alignment of the blade angle on the manifold of the blower system and because of green leaves and inadequate drying of the materials to be burned in the incinerator. Mr. Soich also observed, in part, that "materials need to be prepared better for burning."

25. As a result of this unannounced inspection and the negative VE test, the Department requested SMG to provide an explanation of the VE test results and of the type of changes SMG planned to implement to correct the problem.

26. On learning of the problem, SMG shut down the incinerator and called a McPherson mechanical contractor to come out and adjust the blade angle. Southern Environmental Services conducted another VE test to ensure the problem had been corrected.

27. On April 22, 2002, a VE test was conducted by Southern Environmental Services on-site which showed compliance with the construction permit.

28. On April 30, 2002, SMG advised the Department that adjustments were made to the baffles to correct the angles. SMG provided the Department with the April 22, 2002, VE test results. SMG also implemented better operational procedures.

29. On May 30, 2002, with Mr. Soich present, SMG, by Byron E. Nelson, performed another VE test. The test results showed compliance with the opacity limits in the construction permit and the results were submitted to the Department.<sup>2</sup>

30. Mr. Nelson, an environmental engineer with Southern Environmental Sciences, testified that he has been involved in preparing approximately two dozen applications for air curtain incinerators and has conducted probably "thousands" of visible emissions tests. Mr. Nelson is certified by the State of Florida to conduct VE tests. He has seen "two or three dozen" air curtain incinerators in operation and has conducted VE tests on about 20 of them.

31. Based on his experience, Mr. Nelson testified that SMG employed the same practices and controls to control odor, smoke, and fugitive emissions as other such incinerators he is familiar with. He testified that the amount of smoke and odors from the SMG incinerator is similar to that emitted from other air curtain incinerators, and that the fugitive emissions from the SMG incinerator were probably less than others he is familiar with.

32. Based on his experience, Mr. Nelson opined that SMG has taken reasonable measures to minimize odor, smoke and dust/particulates from the operation of the incinerator. Mr. Nelson likewise opined that the SMG incinerator is well run, perhaps better run than other incinerators. (Mr. Nelson had been on the SMG site twice when the incinerator was operating and burning wood products.)

33. Based on his experience, Mr. Nelson opined that SMG meets the requirements necessary to obtain an air operating permit from the Department and has demonstrated that it has complied with the conditions of its construction permit.

34. Mr. Soich is the air compliance inspector for the Department's Southwest District Office. He testified that he has inspected the operations of other air curtain incinerators over the last 15 years.

35. Mr. Soich testified that SMG is one of the "better operators" of air curtain incinerators he is familiar with. (Mr. Soich visited the SMG site approximately nine times from March 13, 2002, to October 15, 2002.)

36. Mr. McDonald is the Air Permitting Engineer for the Southwest District Office of the Department. He is responsible for reviewing all applications for air curtain incinerators in the Southwest District and has reviewed applications for between 25 and 30 incinerators. Mr. McDonald reviewed the SMG permit applications.

37. Based on the latest VE test results, copies of the records attached to the operating permit application, and his experience, Mr. McDonald, for the Department, determined that SMG had demonstrated compliance with the conditions of the construction permit and recommended issuance of the operating permit for the incinerator. He maintained the same position at hearing.

38. SMG provided assurance that the DeRosa Fire Department would respond in the event of a fire at the incinerator.

39. On June 19, 2002, the Department issued the proposed air operating permit.

#### Operation of the Air Curtain Incinerator

40. Emissions from the incinerator are controlled by a curtain of forced air at a very high static pressure over and

around the burning pit. The air curtain traps smoke and small particles and recirculates them to enhance combustion and reduce smoke. The underfire air introduces air underneath the air curtain to ensure complete combustion and minimize opacity at start-up. The refractory-tiled ceramic concrete burn pit provides a safe combustion chamber, and the refractory panels keep excess heat from escaping. The upper chamber refractory panels, which surround three sides of the burn pit, allow more retention time in the burner to better control opacity and sparks. The stainless screen spark arrestor also controls sparks and debris from leaving the burner.

41. The operating permit application proposed the use of an air curtain blower along with a manifold to provide forced air to the burning pit. According to the manufacturer specifications, the blower can force air into the pit at velocities of between 100 and 120 mph. This ensures that the flames in the burn pit receive enough oxygen to combust completely. The air circulates inside the burn pit to ensure a complete burn, which reduces smoke and odor.

42. The combustion temperature for the burning pit ranges from approximately 1,800 to 2,500 degrees Fahrenheit.

43. The operating permit allows a maximum charging rate of ten tons per hour on a daily average basis and 31,200 tons per



any consecutive 12 month period. The incinerator has been operating below the maximum charging rate.

44. The operating permit limits the hours of operation (charging) to 3,120 hours per year, i.e., ten hours/day, six days/week, 52 weeks/year. According to various SMG operating and maintenance logs, the incinerator has been operated below this limit.

45. The operating permit, in accordance with Rule 62-296.401(7), Florida Administrative Code, allows the burning of only wood waste, yard waste, and clean lumber, and prohibits the burning/incineration of materials such as sawdust, paper, trash, tires, garbage, rubber material, plastics, liquid wastes, Bunker C residual oil, roofing materials, tar, asphalt, railroad cross ties, or other creosoted lumber, chemically treated or painted wood, and other similar materials. Biological waste shall not be burned in the incinerator.

46. During its operation, the incinerator only burned wood and yard waste, and Mr. Gerrits testified that the waste materials are inspected before being burned in order to ensure that no prohibited materials are burned. If any non-authorized materials are observed, they are removed before the waste is burned. See Finding of Fact 24.

47. The operating permit allows visible emissions during start-up periods (not to exceed the first 30 minutes of

operation) of an opacity up to 35 percent, averaged over a six-minute period, as provided for in Rule 62-296.401(7)(a)-(b), Florida Administrative Code. The McPherson model is designed to meet the requirements of the above-referenced rule, and the VE tests run during start-up periods (except one performed by Mr. Soich on April 19, 2002) demonstrated compliance with this requirement. Id.

48. The operating permit limits visible emissions outside of start-up periods (the first 30 minutes of daily operation) to no more than five percent opacity, with visible emissions of up to ten percent opacity allowed up to three minutes in any one hour as provided for in Rule 62-296.401(7)(a), Florida Administrative Code, and 40 Code of Federal Regulations Part 60, Subpart CCCC, adopted and incorporated by reference in Rule 62-204.800(8)(b)74, Florida Administrative Code. (Rule 62-296.401(7)(a) permits up to 20 percent opacity. The ten percent rate is required by the new federal standard. See SMG Exhibit 13, page 3 of 9.) The opacity limits in the operating permit are more stringent than those contained in the construction permit, which allows visible emissions of up to 20 percent opacity up to three minutes in any one-hour period. (By definition, a "visible emission" is "[a]n emission greater than 5 percent opacity or 1/4 Ringelmann measured by standard methods." Rule 62-296.200(278), Florida Administrative Code.)

49. The VE test results submitted by SMG demonstrate compliance with the opacity limits in the operating permit and with the opacity limits in the construction permit for the days tested. See Findings of Fact 18, 22, 27, and 29.

50. The operating permit requires that the incinerator must be attended at all times while materials are being burned and that public access to the incinerator must be restricted. A certified operator is in attendance whenever the incinerator is operated, i.e., when something is burning in the incinerator. A fence has been constructed around the property.

51. The operating permit prohibits starting the incinerator before sunrise and requires that all charging of the incinerator be completely stopped before sunset as required by Rule 62-296.401(7)(h), Florida Administrative Code. Mr. Gerrits testified that the incinerator is never started before sunrise and is typically started after 8:00 a.m. Mr. Gerrits testified that the incinerator is never charged after sunset and that charging typically stops at 4:00 or 5:00 p.m. See Endnote 4. These practices are consistent with the Operations and Maintenance Guide for the incinerator.

52. The operating permit limits the height of the ash in the burning pit to one-third of the depth of the pit or to a point where the ash begins to impede combustion, whichever occurs first as provided in Rule 62-296.401(7)(m), Florida

Administrative Code. The one-third depth line is marked on the outside of the incinerator. Mr. Gerrits testified that ash is regularly removed from the burning pit every third day to keep the ash level low, which helps ensure better combustion and reduces smoke.

53. The operating permit provides that material shall not be loaded into the incinerator in such a way that it will protrude above the air curtain. Testimony established that the SMG incinerator is properly loaded.

54. The operating permit requires that all operators of the incinerator be trained in the proper operation and maintenance of the incinerator and that an operations and maintenance guide be maintained at the facility at all times. All of the operators of the SMG incinerator have taken a four-hour training course to learn how to operate the incinerator in accordance with Department regulations and good operating practices, and certificates attesting to that training were submitted with the application for the operating permit. An Operations and Maintenance Guide was submitted with the application for the construction permit.

55. The operating permit requires the maintenance of a daily operating log. The daily operating log must be maintained at the facility for at least five years and must be available for inspection by the Department upon request. SMG currently

maintains a daily operating log that meets the requirements of the construction permit. SMG submits those daily logs to the Department on a monthly basis after the Department requested that SMG do so. The log includes a date and site location, daily operating hours, total charges, total material charged in tons, average hourly charging rate, any maintenance performed, fuel usage in gallons, and the operator's signature. The logs of record contain this information and have been initialed by SMG's operator for each day when the incinerator has been operated.

56. SMG operators responsible for preparing the logs have no incentive to indicate the incinerator is not operating on days or during hours when it is running, as a deliberate misstatement on the operating logs could result in enforcement action by the Department and being fired by SMG.

57. The operating permit requires that all reasonable precautions be undertaken to prevent and control the generation of unconfined emissions of particulate matter in accordance with Rule 62-296.320(4)(c), Florida Administrative Code. SMG takes reasonable precautions to prevent and control the generation of unconfined emissions of particulate matter, including paving the road that leads to the incinerator to reduce dust, wetting the ashes removed from the burn pit, wetting the ash piles and ramp that addresses the incinerator, approaching the incinerator at a

slow rate, and placing a charge into the incinerator slowly and carefully. SMG voluntarily added a sprinkler system on all four corners of the burning pit that was not contemplated by the construction permit. The Department witness Mr. McDonald testified that this provided an additional method to control unconfined emissions.

58. Although the construction permit and proposed permit do not contain conditions prohibiting the burning of green wood or wet wood waste, SMG takes precautions at the request of Mr. Soich to ensure that the wood is properly dried before being burned. See Finding of Fact 24. This helps to reduce smoke and emissions from the incinerator. (Moisture is the primary factor that inhibits burning and causes smoke and potentially odor.)

59. As part of the routine practice in handling the wood waste before it is burned, trucks bringing wood waste to the incinerator are instructed to dump it into a pile. SMG operators then use a loader to flatten out the pile and remove dirt, prohibited materials, and harvestable pieces of wood. Harvestable pieces of wood and dirt are removed to separate staging areas. The remaining wood waste is separated into long windrows, with the oldest row closest to the incinerator. The windrows are flipped or rolled over in the direction of the incinerator, allowing the waste to dry. The waste in the row

closest to the incinerator is burned, and subsequent windrows are rolled over in its place.

60. Ash is generally removed from the burn pit every third day; it is wetted on removal to reduce dust, and the ash piles adjacent to the incinerator are also kept wetted by the sprinkler system. The ash is eventually mixed with the dirt in a composter for use as Class-A unrestricted compost.

61. The SMG operator in charge on a particular day decides whether the incinerator will operate that day, in accordance with standard operational practices. The operator checks the weather forecast. If it is raining or if there are high winds (over 20 miles per hour), the incinerator will not be operated that day, and SMG typically waits four days after a rain to begin operating the incinerator again. These procedures are not contained in any permit conditions.

62. The purpose of not operating during or immediately after a rain and taking steps to ensure the wood is dry is to reduce smoke; wet wood smokes more. Rainy weather can also affect odor.

63. The purpose of not operating during windy conditions is to reduce the possibility of fire on SMG's property, but wind can also affect odor and visible emissions.

64. On days when the incinerator is not operating, SMG conducts yard maintenance, maintains the waste windrows, and

runs the composter. The composter is a source of noise and is located adjacent to the incinerator and is run when the incinerator is shut down.

65. To ensure that the visible emission limitations are not exceeded and objectionable odors<sup>3</sup> not generated, the operating permit requires that the incinerator's fan shall continue to operate after the last charge of the day until all combustion (presence of any flame or smoke) has ceased. Generally, the incinerator keeps burning an hour to an hour and one-half. Mr. Gerrits testified that the fan is kept running until the flames and smoke die out and that a certified operator is present until the fan is switched off.

66. The operating permit requires that the testing of visible emissions must be conducted within 90-100 percent of the maximum allowable charging rate of 10 tons/hour and shall be conducted when the highest emissions can reasonable be expected to occur.<sup>4</sup> Testing of the SMG incinerator was conducted at within 90-100 percent of the maximum allowable charging rate of 10 tons per hour, and the May 30, 2002, test results indicated that the incinerator was operating within the opacity limits of its permit even when operating at close to maximum capacity. Evidence established that the May 30, 2002, VE test complied with the specific conditions of both the construction and operating permit. See Finding of Fact 29.



67. The test method for visible emissions required by both the construction permit and the operating permit is EPA Method 9, adopted and incorporated by reference at Rule 62-204.800(8)(b)74, Florida Administrative Code. (Method 22 is not required pursuant to Department rules for compliance testing of an air curtain incinerator.) Testimony established that Method 9 was the method used for the VE tests conducted on the SMG incinerator.

68. As required by both the construction and operating permits, the incinerator is located in excess of 300 feet from any pre-existing occupied building located off site as required by Rule 62-296.401(7)(j), Florida Administrative Code. The closest residences, that of Mr. Gerrits' father and his tenant, are approximately 1,500 feet away.

#### Petitioners' Challenge

69. For the most part, Petitioners reside northeast, east, or southeast of the incinerator. One Petitioner resides approximately three-tenths of a mile southeast of the incinerator; others reside at greater distances, up to approximately a mile and one-half away from the incinerator.

70. Each of the Petitioners who testified have resided in this area for many years, pre-dating the operation of the incinerator.

71. The Petitioners who testified were credible and well-intentioned. Each of these Petitioners maintained daily logs covering several months when the incinerator was authorized to operate. Some kept logs for several months, while others kept logs for several days. They noted their observations and perceptions in the logs.

72. Admittedly, Petitioners are not experts in the detection of odors or noise levels. Nevertheless, they recorded their own experiences as to what they saw, heard, and/or smelled, believing that the odors and noise came from the incinerator. Some recorded that they smelled the strong odor of smoke, an "acrid smell," a "pungent smell," for example; "it makes your eyes burn and throat burn" said another during the hearing. One witness described the experience as being a prisoner in his house. Another does not go outside when the smell is bad. Generally, the level of odor varied with the weather conditions, i.e., a stronger odor was noticed on foggy and wet days or nights and when the wind blows from the west, which Petitioners contend is the prevailing wind. Some witnesses only smelled the odor during the night and not during the day, and not all of the time. Some complained about the odor and noise, or one and not the other.

73. Some believed the noise coming from the incinerator was a major problem. At least two witnesses who live approximately

three-tenths of a mile and 3,500 feet, respectively, from the incinerator site, described the noise as being like a jet airplane. One witness shuts her windows to keep out the noise. (SMG also operates a "wood chipper" or "composter" on site which is loud. Mr. Gerrits stated that he did not think the sound was the same as made by the incinerator fan. He also stated that "[i]t doesn't exceed the noise decibels. It doesn't exceed background noise levels at [their] property line.")

74. Petitioners documented their concerns which are described, in part, above, and also documented their complaints to the Department and local government.

75. It appears that each of the logs prepared by the Petitioners (who kept logs) were given to Petitioner Martha Futscher, who summarized and compiled a hand-written master list of the complaints. Then, Mr. Harvey inputted this data on the master list (spread sheet) of complaints, which appears as Petitioners' Exhibit F1. The master list contains recorded observations from May 2002 through January 2003. The master list contains a representation of when the incinerator started and stopped for various days and when it was operational or not, and this information was derived, according to Mr. Harvey, from the logs maintained by SMG. The master list also provides tons per hour of waste burned on particular days, the observer's initials, and the approximate distance each observer lived from

the incinerator, and the comments, with time of observation or perception noted.

76. There are discrepancies between the master list and the actual logs maintained by SMG as to when the incinerator was operational.

77. There also appears to be several differences in observations between the Petitioners' master list and other evidence which indicates when Mr. Soich inspected the incinerator and determined that the incinerator was operating satisfactorily. Compare Petitioners' Exhibit 2 with Petitioners' Exhibit F1. For example, the master list records an observation from May 30, 2002, when the incinerator was operating, when there was noise and smoke noted at 8:00 a.m., and flames at the incinerator and odor at 5:30 p.m. Conversely, Mr. Soich was on-site on May 30, 2002, and observed the scheduled VE test. No problems were noted with the operation on this date by Mr. Soich. Mr. Soich also noted that "wood waste was properly dry and free of debris." The VE test on May 30, 2002, was performed from 10:29 a.m. to 11:59 a.m. and showed compliance with opacity limits.

78. The master list indicates that black smoke was observed (no time given) on May 7, 2002, when the incinerator was operational, yet Mr. Soich inspected the incinerator on that day and there is a notation in the record that the incinerator was

operating between 0-5 percent visible emissions. (Mr. Soich opined that it should be very rare to smell objectionable odors if the visible emissions run at a 5 percent level.)

79. For October 15, 2002, there is a notation in the master list that a Petitioner commented that the incinerator was running during the day ("AM/PM Running") and that there was a strong smell at approximately 7:05 p.m. A strong smell at the person's house was also noted at approximately 9:30 p.m. on that day. However, Mr. Soich performed an annual inspection of the incinerator on October 15, 2002, and there is a notation on the master list, Petitioners' Exhibit 2, that the incinerator was not operating due to recent rain.

80. As one Petitioner testified, her point was that the inspectors are not there when she hears the noise, sees smoke, and smells the odor. Mr. Soich confirmed that he does not inspect the facility in the evening.

81. Petitioners also provided, as evidence in support of their position, six videotapes of the incinerator for September 19, October 3, October 23, November 25 (2 tapes), 2002, and January 10, 2003. (Mr. Harvey took the videotapes from the same location, across the street and west of the incinerator.)

82. Each tape, except for September 19, 2002, showed smoke emanating from the operational incinerator. On September 19,

2002, the incinerator was not running according to the SMG log. There was a malfunction which was reported to the Department. The SMG log indicates that the pit was cleaned out, site cleared and rows moved. There is also a notation in the SMG log for this date that there was a power failure/malfunction at the incinerator at 9:00 a.m., and that the power was out. According to Mr. Gerrits, the malfunction caused smoke. (One Petitioner observed smoke from ashes on September 19, 2002.)

83. While the Petitioners proved that there was smoke emanating from the operation of the incinerator on the days which were videotaped, with the exception of September 19, 2002, this did not necessarily prove that the emissions exceeded the requirements of the Department rules or that there was an objectionable odor emanating therefrom.

84. Mr. Stoich observed the videotapes played during the hearing. In particular, with respect to the January 10, 2003, videotape, Petitioners' Exhibit 12, Mr. Stoich stated that a level of opacity cannot be determined from photographs and videotapes. He also noted that there was "a lot of white smoke," an atypical situation according to him, emanating from the incinerator and that he, as a compliance inspector, would have investigated further and performed an inspection, including a VE test, to determine if there was a violation, had he seen this smoke. However, he stated that without actually seeing the

operation, he could not determine whether a violation had occurred.

85. There was persuasive evidence that compliance with the opacity limits of a permit can only be determined through VE tests conducted using the Department-approved EPA Method 9. The VE test takes into account wind, the angle of the plume, the position of the sun, and other factors, and must use appropriate averaging to ensure that the test is valid.

86. A smoke plume can look quite dense at the wrong angle or if the light is reflecting off the plume in a certain way, when in fact it is in compliance with Department rules.

87. The VE tests for the incinerator have, with one exception, see Finding of Fact 24, demonstrated compliance with the opacity limits in the construction permit. As noted herein, upon receipt of notice that one VE test failed, SMG implemented corrective actions, and two VE tests conducted after the time showed the incinerator was operating in compliance with the opacity limits of the permit. See Findings of Fact 27 and 29.

88. The Department relies on its compliance inspectors, such as Mr. Soich, to make a determination of whether an air emission source is causing an objectionable odor.

89. There does not appear to be an approved Department method for measuring odors from incinerators. (Mr. Nelson

stated that odors are difficult to test and that "odor is done collecting samples." No samples were taken or analyzed.)

90. On the other hand, Mr. Soich testified that, based on his years of experience, he has developed certain methods for determining whether a facility is emitting an objectionable odor under the rules. If he receives an odor complaint, which he has in this case, he goes to the site and checks the prevailing winds. He also travels around the facility to determine the source of the odor. An odor can be deemed objectionable if it is very strong and overpowering, such that he cannot stay on-site and breathe in the odors. An odor can also be deemed objectionable if, after being on-site for some extended period of time, he begins to develop symptoms such as runny eyes, a scratchy throat, or a headache as a result of the smell. Finally, he may bring along another Department employee to determine whether the other individual finds the odor objectionable.

91. Enforcement actions can be taken if objectionable odors are detected.

92. Mr. Soich testified that he has inspected the incinerator at least nine times in the past year and never detected an objectionable odor. On some of the visits, the incinerator was not operational.



93. On rebuttal, several residents of the area testified that they had not experienced objectionable odors from the incinerator.

94. David Stevens, the Chief of the DeRosa County Fire Department, testified that an open land-clearing burn emits black smoke, more so than he observed from the incinerator. This fire department only had to respond to false alarms at the incinerator. Mr. Stevens personally inspected the operation of the incinerator and thought it was a very safe operation.

95. Randy Morgan, a wildlife firefighter and certified burner with the Division of Forestry with over 16 years of experience in fire control, testified that approximately 50,000 acres of the state land burns occurred in Citrus County last year. These land burns can be a significant source of smoke and odor. In addition, approximately 50 open burn authorizations are issued each day. He also testified that controlled burns of approximately 15 fires of approximately 50 to 2,000 acres a day occurred in 2002 in proximity of the SMG incinerator which is a source of smoke and odor. The state also conducts open burns of some kind approximately ten months out of the year.

96. Other witnesses testified that, given the rural nature of the community, open burning of trash, wood, and leaves occurs on a regular basis.

## Ultimate Findings of Fact

97. Credible evidence established that SMG meets or exceeds the requirements in the construction permit to reduce smoke, dust, and odor, and these requirements are carried over to the operating permit.

98. Credible evidence established that SMG employs the same, if not better, practices and permit conditions to control smoke, dust, and odor as other air curtain incinerators in the state.

99. Credible evidence established that the SMG incinerator is operated in accordance with its construction permit.

100. Credible evidence established that the SMG incinerator can be expected to be operated in accordance with its operating permit.

101. Credible evidence established that the SMG incinerator is operated in accordance with Department rules.

102. In light of the foregoing, SMG has demonstrated reasonable assurance that its air curtain incinerator has been operated in compliance with the construction permit and that the incinerator can continue to be operated in accordance with the conditions of the operating permit.

## CONCLUSIONS OF LAW

103. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of,

this proceeding. Sections 120.569 and 120.57(1), Florida Statutes.

104. Petitioners have standing in this proceeding.

105. The purpose of this proceeding, conducted pursuant to Section 120.57(1), Florida Statutes, is to "formulate final agency action, not to review action taken earlier and preliminarily." McDonald v. Florida Department of Banking and Finance, 346 So. 2d 81 (Fla. 1st DCA 1977).

106. The burden of proof in the proceeding is on the party asserting the affirmative in the proceeding, here SMG. Florida Department of Transportation v. J.W.C., Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981). If a regulatory agency gives notice of intent to grant a permit application, the applicant has the initial burden of going forward with the presentation of a prima facie case of the applicant's entitlement to a permit. In the context of this proceeding, SMG had the initial burden of showing that it provided reasonable assurance that the operation of the air curtain incinerator is consistent with the applicable statutes and rules of the Department.

107. Once the applicant has made a prima facie case that the proposed permit should be issued, the Petitioners, here Louis A. Gerace, et al., must rebut that prima facie case and support the allegations of its petition, here the Amended Petition, challenging the proposed permit. Id. at 789. Unless

Petitioners presented "contrary evidence of equivalent equality" to the evidence presented by the applicant, here SMG, and the agency, here the Department, the permit must be approved. Id. at 789-790.

108. Petitioners cannot carry the burden of presenting contrary evidence by mere speculation concerning what "might" occur. Chipola Basin Protective Group, Inc. v. Department of Environmental Regulation, Case No. 88-3355, 1988 WL 1859974 (Dept. Env. Reg. Dec. 29, 1988).

109. The standard for an applicant's burden of proof is one of reasonable assurances, not absolute guarantees, that the applicable conditions for the issuance of a permit have been satisfied. ManaSota-88, Inc. v. Agrico Chemicals, Co. and Florida Department of Environmental Regulation, 12 F.A.L.R. 1319, 1325 (DER Feb. 19, 1990).

110. "Reasonable assurance" contemplates "a substantial likelihood that the project will be successfully implemented." Metropolitan Dade County v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). See also, Hamilton County Board of County Commissioners v. Florida Department of Environmental Regulation, 587 So. 2d 1378 (Fla. 1st DCA 1991).

111. The issuance of a permit must be based solely on compliance with applicable permit criteria. Council of Lower Keys v. Toppino, 429 So. 2d 67 (Fla. 3d DCA 1983).

112. In order to demonstrate entitlement to an air operating permit for an air curtain incinerator, the holder of an air construction permit, here SMG, must demonstrate compliance with the conditions of the construction permit. Rule 62-210.300(2), Florida Administrative Code. To do that, the construction permit requires the permit holder to include with the application for operating permit copies of at least two weeks of recent daily operating logs and a copy of a visible emissions test showing compliance with the opacity limits in the construction permit.

113. An air curtain incinerator must meet the specific emissions standards contained in Rule 62-296.401(1) and (7), Florida Administrative Code, and the general emissions standards contained in Rule 62-296.320(2) and (3), Florida Administrative Code.

114. The specific conditions of the operating permit are consistent with the applicable requirements of Chapter 62-296, Florida Administrative Code, and in particular, Rules 62-296.320, and 62-296.401, Florida Administrative Code. The general conditions of the operating permit are consistent with the requirements of Rule 62-4.160, Florida Administrative Code.

115. On a preliminary basis, the Department determined that SMG had provided reasonable assurance to indicate that the operation of the air curtain incinerator would comply with the

appropriate provisions of Chapters 62-4 and 62-204 through 62-297, Florida Administrative Code. As a measure of assurance that SMG would comply with the applicable provisions of these chapters, the Department, under the authority of Rule 62-4.070(3), Florida Administrative Code, placed 38 specific conditions on the proposed permit which included, among other things, the requirements of Rule 62-296.401(1) and (7), Florida Administrative Code, dealing specifically with air curtain incinerators. Additionally, applicable general conditions from Rule 62-4.160, Florida Administrative Code, are incorporated into the permit. The amendment to the permit has another specific condition governing the management and storage of the waste on-site.

116. Rules 62-296.320(2) and 62-296.401(1)(b), Florida Administrative Code, provide that an incinerator shall not cause or contribute to an objectionable odor. An objectionable odor is defined in Rule 62-210.200(181), Florida Administrative Code, as any odor that "is or may be harmful or injurious to human health or welfare, which unreasonably interferes with the comfortable use and enjoyment of life or property, or which creates a nuisance."

117. In order for an odor to be deemed "objectionable" under this definition, the odor must be "so strong, intense or noxious that [it is] legally classified as 'objectionable

odors.'" City of Jacksonville v. Department of Environmental Protection and Kimmins Recycling Corporation, Case No. 01-0783, 2001 WL 1917259 at \*5 and \*26 (DEP Oct. 18, 2001). (In Kimmins, the Department agreed with the conclusion reached by the ALJ "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 unreasonable interfere with the use and enjoyment of property by other persons others [sic] in the vicinity of the proposed Facility site." Id.)

118. A nuisance is defined as an unreasonable interference with another's use or enjoyment of property. The test for an actionable nuisance is the rule of reasonableness of the use complained of under the circumstances. Lee v. Florida Public Utilities Commission, 145 So. 2d 299, 301-302 (Fla. 1st DCA 1962). The test to be applied is of the effect of the offending conditions on "an ordinary, reasonable man with a reasonable disposition and ordinary health and possessing the average and normal sensibilities." Nitram Chemicals, Inc. v. Parker, 200 So. 2d 220, 231 (Fla. 2d DCA 1967).

119. A party pleading nuisance must also establish that the use complained of is the actual, proximate cause of the injury. "[T]estimony consisting of guesses, conjectures or speculation" is not sufficient. Durrance v. Sanders, 329 So. 2d

26, 29-30 (Fla. 1st DCA 1976), cert. denied, 339 So. 2d 1171 (Fla. 1976).

120. The persuasive evidence indicates that SMG affirmatively provided, during this de novo hearing, reasonable assurance that the operation of the air curtain incinerator will not discharge, emit, or cause pollution in contravention of Department standards or rules. The specific conditions recited in the operation permit are sufficient to assure compliance.

121. Petitioners documented their concerns. Noise levels and odors, which Petitioners found objectionable, were documented. Four days of videotapes of the incinerator in operation, as well as daily logs maintained by Petitioners, demonstrated some of Petitioners' concerns.

122. The videotapes indicate that there was smoke emanating from the incinerator on those operational days. However, Petitioners did not provide any scientific evidence, such as a visible emissions test, to demonstrate that the smoke, on those or other occasions, exceeded the opacity levels established by the Department's rules. The persuasive evidence indicates that a visible emissions test cannot be performed by viewing photographs or a videotape.

123. On the other hand, the visible emissions tests of record, except one, indicate that SMG operated the incinerator,



on the days tested, in compliance with the Department opacity rules.

124. Furthermore, while Petitioners have documented their perception of objectionable noise emanating from the incinerator, the Department does not regulate noise levels with respect to air curtain incinerators. Therefore, this is not a basis to deny the permit.

125. The persuasive evidence indicates there is no scientific method of evaluating whether objectionable odors are emanating from the air curtain incinerator. But see Department of Environmental Protection v. Holmes Dirt Service, Inc. and William J. Holmes, Case No. 02-2278 (DOAH Dec. 24, 2002)(samples gathered for testing for hydrogen sulfide emanating from a construction and demolition debris disposal facility).

126. Petitioners, who live in proximity to the incinerator, live with the operation of the incinerator on a daily basis and have documented their perceptions that odors emanate from the incinerator, which they find objectionable. The evidence, however, is mixed as to the relationship between Petitioners' odor complaints and the operation of the incinerator.

127. Nevertheless, Petitioners did not adequately rebut the evidence presented by SMG and the Department that SMG has

given reasonable assurance that its air curtain incinerator will operate and not cause or emit objectionable odors.

128. The same can be said for the release of unconfined or fugitive emissions. Petitioners did not sufficiently prove that SMG could not operate the air curtain incinerator in accordance with its operating permit, which requires SMG to take reasonable precautions to control unconfined or fugitive emissions.

129. SMG demonstrated that the air curtain incinerator has operated in compliance with the terms and conditions of its construction permit and has provided reasonable assurance that the incinerator will be operated in compliance with the terms and conditions of the operating permit.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Environmental Protection enter a final order granting SMG's application and issuing Permit No. 0170360-002-AO, as amended, and subject to all conditions, including but not limited to the Specific Conditions set forth in the Department's Notice of Intent to Issue, for the operation of an air curtain incinerator in Citrus County, Florida. It is further recommended that Petitioners' challenge to the amendment to the operating permit be dismissed. See Preliminary Statement.

DONE AND ENTERED this 21st day of April, 2003, in  
Tallahassee, Leon County, Florida.<sup>5</sup>

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CHARLES A. STAMPELOS  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 21st day of April, 2003.

ENDNOTES

<sup>1/</sup> The construction permit authorized the construction of the incinerator "[o]n the east or west side of 6844 N. Citrus Avenue, Crystal River," Citrus County, Florida. The operation permit authorizes the incinerator to be located on the east or west side of 6400 North Citrus Avenue. While mentioned in Petitioners' Proposed Recommended Order, page 4, and mentioned during examination during the hearing, Petitioners did not challenge the change in location in the Amended Petition.

<sup>2/</sup> The test method for visible emissions required by both the construction permit and the operating permit is EPA Method 9, adopted and incorporated by reference at Rule 62-204.800(8)(b)74, Florida Administrative Code. EPA Method 9 is the method used for the visible emissions tests conducted on the SMG incinerator.

<sup>3/</sup> The operation of the SMG incinerator shall not "cause, suffer, allow or permit the discharge of air pollutants which cause or contribute to an objectionable odor." Rule 62-296.320(2), Florida Administrative Code. See also Rule 62-401(1)(b), Florida Administrative Code; Conclusion of Law 116.

<sup>4/</sup> The permit defines "[c]harging rate as 1) the amount of material placed in the incinerator during the period starting with the initial loading and ending 60 minutes after initial combustion, for the first 60 minute period after initial combustion and 2) the amount of material placed in the incinerator for any 60 minute period thereafter."

<sup>5/</sup> A copy of this Recommended Order has been furnished to the Petitioners by and through Mr. Morris Harvey, Petitioners' qualified representative. See Rule 28-106.105(2), Florida Administrative Code.

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NOTICE OF RIGHT TO FILE EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.