STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Petitioner,

vs. Case No. 14-3674

SOUTH PALAFOX PROPERTIES, INC.,

Respondent.
_____/

RECOMMENDED ORDER

This matter was heard before the Division of Administrative Hearings (DOAH) by its assigned Administrative Law Judge, D. R. Alexander, on December 9-11, 2014, in Pensacola, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether Respondent's Construction and Demolition Debris Disposal Facility Permit No. 003397-013-SO

(the Permit) should be revoked and the facility closed for the reasons stated in the Department of Environmental Protection's (Department's) Notice of Revocation (Notice) issued on July 31, 2014.

PRELIMINARY STATEMENT

In an eight-count Notice, the Department proposes to revoke Respondent's Permit and close its facility for violating Permit conditions and rules that govern the operation of the facility, including a failure to comply with certain time frames and/or deadlines required by a 2012 Consent Order. Respondent timely requested a hearing to contest the proposed agency action, and the matter was referred to DOAH to conduct a hearing.

At the final hearing, the Department presented the testimony of five witnesses. Department Exhibits 1 through 8, 14, 18, 20, 22, 23, 30, 36, and 40 were received in evidence. Respondent presented the testimony of four witnesses. Respondent's Exhibits 1 through 5, 27, and 28 were accepted in evidence. The deposition of one witness was submitted by Respondent on a proffer basis only. Joint Exhibits 1 and 2 were also admitted. Finally, official recognition of the following matters was taken: chapter 120, Florida Statutes (2014); sections 403.021, 403.031, 403.061, 403.087, 403.121, 403.161, 403.703, 403.704, and 403.707; Florida Administrative Code Chapters 62-4, 62-302, 62-701, and 62-780; rules 62-210.200 and

62-296.320; and 40 C.F.R. Part 264, Subpart II, adopted by reference at rule 62-701.630.

A three-volume Transcript of the hearing has been prepared. Proposed Recommended Orders (PROs) were filed by the parties, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. The Parties, the Property, and the Dispute

1. The Department administers and enforces the provisions of chapter 403 and the rules promulgated thereunder, including those applicable to construction and demolition debris (C & D) disposal facilities.

2. Respondent is a Florida limited liability corporation that owns real property located at 6990 Rolling Hills Road, Pensacola, Escambia County (County), Florida. The large, odd-shaped parcel (whose exact size is unknown) is south-southwest of the intersection of Interstate 10 and Pensacola Boulevard (U.S. Highway 29) and has Class III fresh surface waters running in a northeast-southwest direction through the middle of the property. See Resp. Ex. 28. The entire site is surrounded by a six-foot tall fence or is separated from adjoining properties by natural barriers. A railroad track borders on the eastern side of the parcel; the western boundary fronts on Rolling Hills Road; and the northern boundary appears to be just south of West

Pinestead Road. Id. The area immediately south of the parcel appears to be largely undeveloped. See Dept. Ex. 40. The Emerald Coast Utilities Authority (ECUA), a local government body, has an easement that runs along the eastern side of the property adjacent to the railroad track on which a 48-inch sewer pipe is located.

3. An older residential area, known as Wedgewood, is located northeast of the facility on the north side of West Pinestead Road. Id. The closest Wedgewood homes appear to be around 400 or 500 feet from the edge of Respondent's property. A community and recreational center, the Marie K. Young Center, also known as the Wedgewood Center, serves the Wedgewood community, is northwest of the facility, and lies around 500 feet from the edge of the property. Established in 2012 where a school once stood, it has more than 200 members. Although non-parties, it is fair to say that the Wedgewood community and County strongly support the Department's efforts to revoke Respondent's permit.

4. Respondent acquired the property in 2007. At that time, an existing C & D disposal facility (the facility) was located on the property operating under a permit issued by the Department. The Permit was renewed in February 2013 and will expire in early 2018. Besides the general and specific conditions, the renewed Permit incorporates the terms and

conditions of a Consent Order executed in November 2012, as well as detailed requirements relating to the operation of the facility, water quality monitoring, an odor remediation plan, financial assurance and cost estimates, and closure of the facility. The latter requirements are found in four Appendices attached to the Permit.

5. The facility operates under the name of Rolling Hills Construction and Demolition Recycling Center. All material received by the facility is disposed of in an active disposal pile known as cell 2, located in the middle of the northern section of the parcel. Cell 1, southwest of cell 2 and just east of Rolling Hills Road, was closed a number of years ago by the prior operator.

6. Respondent operates the only C & D facility in the County.[1/] It currently serves around 50 to 60 active customers, employs 16 persons, and operates between the hours of 7:00 a.m. and 5:00 p.m. The former manager, Charles Davidson, who had overseen operations since 2010, was replaced in June 2014, and Respondent blames him for ignoring or failing to address most of the problems encountered during the last three years. Since June, the managing partner of the LLC, Scott C. Miller, has overseen the operations.

7. Unlike Class I or III landfills, a C & D landfill may accept only construction and demolition debris. Construction

and demolition debris is defined as "discarded materials generally considered to be not water soluble and non-hazardous in nature." § 403.703(6), Fla. Stat.; Fla. Admin. Code R. 62-701.200(24). Debris includes not only items such as steel, glass, brick, concrete, asphalt material, pipe, gypsum wallboard, and lumber that are typically associated with construction or demolition projects, but also rocks, soils, tree remains, trees, and other vegetative matter that normally result from land clearing or land development operations. Id. No solid waste other than construction and demolition debris may be disposed of at the facility. See Fla. Admin. Code R. 62-701.730(4)(d).

8. To address and resolve certain violations that predated the renewal of the Permit, the Department and Respondent entered into a Consent Order on November 14, 2012. See Dept. Ex. 2. These violations occurred in 2011 and included the storage and/or disposal of non-C & D debris, and a failure to timely submit an appropriate Remedial Action Plan (RAP). Id. Among other things, the Consent Order required that within a time certain Respondent submit for Department review and approval an RAP; and after its approval to "continue to follow the time frames and requirements of Chapter 62-780, F.A.C." Id. Those requirements included the initiation of an active remediation system and site rehabilitation within a time certain, and the

continued monitoring and related corrective action for any water quality violations or impacts. Id.

9. To ensure that it has the financial ability to undertake any required corrective action, the Permit requires Respondent to provide proof of financial assurance for the corrective action program cost estimates. See Fla. Admin. Code R. 62-701.730(11)(d); § 2, Spec. Cond. F.1. This can be done through a number of mechanisms, such as a performance bond, letter of credit, or cash escrow. The Permit also requires Respondent to provide proof of financial assurance to demonstrate that it has the financial ability to close the facility and otherwise provide for the long-term care cost estimates of the facility. See Fla. Admin. Code R. 62-701.630; § 2, Spec. Cond. F.2. Rather than using a cash escrow or letter of credit, Respondent has chosen to use a performance bond for both requirements. These bonds must be updated annually to include an inflation adjustment.

10. Given the many requirements imposed by the Permit and Consent Order, in 2013 and 2014 several follow-up site inspections of the facility were conducted by the Department, and a review of the operations was made to determine if the various deadlines had been met. Also, in 2014, the Department received complaints from the County and neighboring property owners, almost exclusively by those residing in the Wedgewood

community, regarding offensive odors emanating from the facility.

11. Based on field observations, the review of operations, and odor complaints, on July 31, 2014, the Department issued a Notice containing eight counts of wrongdoing. The Notice was issued under section 403.087(7)(b), which authorizes the Department to revoke a permit when it finds the permit holder has "[v]iolated law, department orders, rules, or regulations, or permit conditions." To Respondent's consternation, the Department opted to use that enforcement mechanism rather than initiating an enforcement action under section 403.121 or executing another consent order, both of which would likely result in a sanction less severe than permit revocation.[2/]

12. The Notice contains the following charges: exceeding surface water quality standards in rules 62-302.500 and 62-302.530 (Count I); failing to implement an RAP as required by the Consent Order and Permit (Count II); failing to provide adequate financial assurances for facility closure costs (Count III); failing to provide financial assurances for the corrective action required by the RAP (Count IV); failing to reduce on-site and off-site objectionable odors and to implement a routine odor monitoring program (Count V); disposing non-C & D waste on site (Count VI); failing to remove unauthorized waste (Count VII); and disposing solid waste outside of its permitted (vertical)

dimension of 130 feet National Geodetic Vertical Datum (NGVD) (Count VIII). These allegations are discussed separately below.

13. Although the Notice is based on violations that occurred on or before July 31, 2014, the undersigned denied the Department's motion in limine that would preclude Respondent from presenting mitigating evidence concerning circumstances surrounding the violations and efforts to remediate them after July 31, 2014. Given that ruling, the Department was allowed to present evidence to show that Respondent's remediation efforts have not been successful and that some violations still existed as of the date of final hearing.

14. Respondent disputes the allegations and contends that most, if not all, are either untrue, inaccurate, have been remedied, or are in the process of being remedied. As noted above, Respondent considers the revocation of its permit too harsh a penalty in light of its continued efforts to comply with Department rules and enforcement guidelines. It contends that the Department is acting at the behest of the County, which desires to close the facility to satisfy the odor complaints of the Wedgewood residents, and to ultimately use the property for a new road that it intends to build in the future.

B. Count I - Water Quality Violations

15. The Notice alleges that two water quality monitoring reports filed by Respondent reflect that it exceeded surface

water quality standards at two monitoring locations (MW-2 and SW-6) sampled on August 26, 2013, and at one monitoring location (MW-2) sampled on March 4, 2014. The Notice alleges that these exceedances constitute a failure to comply with Class III fresh surface water quality standards in rules 62-302.500 and 62-302.530 and therefore violate conditions in the Permit. These standards apply in areas beyond the edge of the discharge area (or zone of discharge) established by the Permit.

16. To ensure compliance with water quality standards, when the Permit was renewed in 2013, a Water Quality Monitoring Report (Appendix 3) was attached to the Permit. It required Respondent to monitor surface water for contamination, identify the locations at which samples must be collected, and specify the testing parameters. All of these conditions were accepted by Respondent and its consultant(s).

17. The monitoring network, already in place when Respondent purchased the facility, consists of six ground water monitoring wells and three surface water monitoring stations. The surface water stations, which must be sampled to determine compliance with water quality criteria, are SW-5, a background location, and SW-6 and MW-2, both compliance locations located outside the zone of discharge. A background location is placed upstream of an activity in order to determine the quality of the water before any impacts by the activity. A compliance location

is placed downstream of an activity to determine any impacts of the facility on surface water.

18. The Water Quality Monitoring Plan and Permit require Respondent to submit semi-annual water quality reports. To conduct the preparation and filing of the reports, Respondent used an outside consulting firm, Enviro Pro Tech, Inc. (EPT). On November 5, 2013, EPT submitted a Second Semi-Annual 2013 report. See Dept. Ex. 5. According to Mr. Miller, who now oversees operations at the facility, EPT did not provide Respondent a copy of the report, or even discuss its findings, before filing it with the Department.

19. A Department engineer reviewed the report and noted that surface water samples exceeded the Class III Fresh Water Quality Standards for iron, copper, lead, zinc, nickel, and mercury at SW-6 and for iron at MW-2. See Dept. Ex. 6. A copy of the Department's report was provided to Respondent and EPT. Notably, the report indicated that background levels were lower than the down-gradient results. Under Department protocol, if the samples at the compliance locations exceed both the regulatory levels and the background, there is a violation of water quality standards. This accepted protocol differs from Respondent's suggested protocol that the background level should be added to the regulatory standard before a comparison with the sample results is made. In sum, except for the reported nickel

value at SW-6, a violation which the Department now says it will not pursue, all exceedances shown on Department Exhibits 5 and 6 are violations of the standards.

20. On April 1, 2014, EPT submitted a First Semi-Annual 2014 report. See Dept. Ex. 7. A Department engineer reviewed the report and noted that the surface water samples at one monitoring location, MW-2, did not meet water quality standards for iron; however, background levels for iron were much higher than downstream. See Dept. Ex. 8. No other exceedances were shown. Although the Department engineer considered the higher background level for iron to be an "inconsistency" since it varied from the prior reports, the reported iron value was treated as a violation when the Notice was drafted. In its PRO, however, the Department concedes that it did not establish a violation of standards for iron, as alleged in paragraph 7 of the Notice.

21. While having no concerns with sampling taken at MW-2, Respondent's expert contends that the reported values for SW-6 are unreliable because the samples taken from that location were turbid and filled with large amounts of suspended solid matter. He noted that the well is located in a wetland area that is "clogged with vegetation." The expert estimated the turbidity at the site to be in the range of 480 to 500 Nephelometric Turbidity Units (NTUs) and believes the sample was taken in a

"high turbid sediment laden area," thus rendering it unreliable. However, at the time of the sample collection, turbidity was measured at 164 NTUs, or much less than the amount estimated by the expert. See Dept. Ex. 5, p. 147.

22. There is no rule or procedure that disallows the use of turbid samples. In fact, they can be representative of actual water quality. Also, rule 62-302.500(2)(d) provides that if an applicant for a C & D permit believes that turbid samples are not representative of water quality, it may use filtered samples by establishing a "translator" during the permitting process. Respondent did not request a translator during the permitting process, nor is any such translator provision found in the Permit.

23. The expert also criticized EPT for holding the 2013 sample for iron for 22 days after collection before reanalyzing it without providing any explanation for this delay. A reasonable inference to draw from the data, however, is that iron was present in the original sample at levels that required dilution and reanalysis.

24. Respondent's expert testified that even though off-site stormwater is discharged onto the property, no offsite monitoring locations exist, and therefore any offsite exceedances would not be reported. He also criticized the sampling locations that were selected by EPT. In fairness to

Respondent, a repositioning of the monitoring network and retesting of the samples might have produced more favorable results. But these are measures that should have been addressed long before this proceeding was initiated. Finally, Respondent's expert testified that the implementation of its RAP, now partially completed, will cure all of the reported exceedances. Assuming this unrefuted testimony is true, it should be taken into account in determining an appropriate penalty.

C. Count II - Failure to Implement an RAP

25. In this Count, the Department alleges that after the issuance of an RAP Approval Order on July 3, 2013, Respondent was required to implement the RAP within 120 days. The Notice alleges that as of July 31, 2014, the RAP had not been implemented.

26. An RAP was first filed by Respondent on November 15, 2010. See Dept. Ex. 3. When the Department determined that changes to the RAP were necessary, the Consent Order imposed a requirement that an RAP addendum be filed within 150 days. The date on which the addendum was filed is not known. However, an RAP Approval Order was issued on July 3, 2013. See Dept. Ex. 4. The terms and conditions in the RAP were incorporated into the renewed Permit. The work required by the RAP consists of two

phases, with all work to be completed within 365 days, or by early July 2014.

27. Phase I related to the initiation of an active remediation system within 120 days, or by October 31, 2013. This phase requires Respondent to install a pump and treat system at the facility, which will withdraw contaminated groundwater through recovery wells, pump the water to aeration basins to treat the water, and then re-infiltrate the treated water back into the ground. As noted below, the system was not operational until the second week in December 2014.

28. Respondent's failure to implement the approved RAP by the established deadline constitutes a violation of rules 62-780.700(11) and 62-780.790 and Permit conditions, as charged in the Notice.

29. While Respondent concedes that it did not comply with the deadline for implementing the RAP, it points out that work on Phase I was begun in a timely manner. However, on October 16, 2013, or just before the 120 days had run, a Notice of Violation was issued by the County. See Resp. Ex. 2. The effect of the Notice of Violation was to halt much of the work on Phase I until Respondent obtained a County stormwater permit. Respondent asserts that this was responsible for all, or most, of the delay.

30. The record shows that the EPT consultant did not apply for the County permit until September 10, 2014, or almost one year after the Notice of Violation was issued. Additional information was required by the County, which was supplied on October 23, 2014, but final sealed documents were not filed by the consultant until around Thanksgiving. The permit was issued by the County "a week or so" before the final hearing.

31. Respondent attributes the delay in applying for a County permit to its former manager and his failure to coordinate with the EPT engineers assigned to the project. It also claims that the County failed to process the application in an expeditious fashion. However, the facts suggest otherwise. Once the permit was issued, Phase I was completed on December 8, 2014, and it was operational at the time of the final hearing.

32. Respondent's expert, hired in August 2014, has proposed a modification to the RAP that would avoid impacting the existing stormwater pond. However, the modification must be reviewed and approved by the Department, and as of the date of the hearing, it had not been formally submitted. The Department asserts that the only reason the modification is being sought is to reduce the cost of a performance bond. In any event, in its PRO, Respondent does not argue that the proposed modification excuses its 13-month delay in completing the requirements of

Phase I, or the second phase of the project, which should have been completed by early July 2014.

D. Count III - Failure to Provide Financial Assurance

33. This Count alleges that Respondent failed to provide the required annual 2014 financial assurance mechanism that demonstrates proof of financial assurance for closure and long-term cost estimates of the facility.

34. At the beginning of 2014, Respondent had an $836,000.00 financial performance bond in place for closure and long-term costs. The Permit requires that on or before March 1 of each year Respondent revise the closure cost estimates to account for inflation in accordance with rule 62-701.630(4). See § 2, Spec. Cond. F.2. Once the estimates are approved, the performance bond must be updated within 60 days. In this case, an increase of around $18,000.00 was required.

35. The annual inflation adjustment estimate was not submitted until April 15, 2014. The Department approved the cost estimates the following day and established a due date of June 16, 2014, for submitting a revised financial assurance. Respondent did not have a revised performance bond in place until a "week or two" before the hearing. Other than Respondent's manager indicating that he had a new bonding agent, no evidence was presented to mitigate this violation.

36. The failure to timely update its financial assurance for closure and long-term costs constitutes a violation of rule 62-701.630, as charged in the Notice.

E. Count IV - Financial Assurances for Corrective Action

37. In the same vein as Count III, the Notice alleges that Respondent failed to maintain a financial assurance mechanism to demonstrate proof that it can undertake the corrective action program required under the RAP.

38. Respondent was required to submit proof of financial assurance for corrective actions within 120 days after the corrective action remedy was selected. On July 3, 2013, the RAP Approval Order selected the appropriate remedy. On August 8, 2013, the Department approved Respondent's corrective action program cost estimates of $566,325.85 and established a deadline of October 31, 2013, for Respondent to submit this proof. When the Notice was issued, a corrective action bond had not been secured, and none was in place at the time of the final hearing. This constitutes a violation of rule 62-701.730(11)(d) and applicable Permit conditions.

39. Respondent's manager, Mr. Miller, concedes that this requirement has not been met. He testified that he was not aware a new bond was required until he took over management of the facility and met with Department staff on June 17, 2014. Due to the Notice, Mr. Miller says he has had significant

difficulty in securing a bond. He explained that the bonding company is extremely reluctant to issue a bond to an entity faced with possible revocation of its permit, especially if such revocation might occur within a matter of months. Mr. Miller says the bonding company wants 100 percent collateralization to put a bond in place. Nonetheless, he is confident that a bond can be secured if only because its cost will dramatically drop when the RAP project is completed. However, even at hearing, he gave no timeline on when this requirement will be fulfilled.

F. Count V - Objectionable Odors

40. One of the driving forces behind the issuance of the Notice is the complaint about off-site objectionable odors. A considerable amount of testimony was devoted to this issue by witnesses representing the Department, County, Wedgewood community, and Respondent. The Notice alleges that during routine inspections in April, May, and July 2014, mainly in response to citizen complaints, Department inspectors detected objectionable odors both at the facility and off-site. The Notice further alleges that Respondent failed to immediately take steps to reduce the odors, submit an odor remediation plan, and implement that plan in violation of rules 62-296.320(2) and 62-701.730(7)(e) and section 2, Specific Condition E of the Permit. Notably, the Department has never revoked a landfill permit due solely to objectionable odors.

41. Several Department rules apply to this Count. First, objectionable odors are defined in rule 62-210.200(200). Second, a C & D facility must control objectionable odors in accordance with rule 62-296.320(2). Finally, if odors are detected off-site, the facility must comply with the requirements of rule 62-701.530(3)(b). That rule provides that once off-site odors have been confirmed, as they were here, the facility must "immediately take steps to reduce the objectionable odors," "submit to the Department for approval an odor remediation plan," and "implement a routine odor monitoring program to determine the timing and extent of any off-site odors, and to evaluate the effectiveness of the odor remediation plan." These same regulatory requirements are embodied in the Permit conditions. See § 2, Spec. Cond. E.

42. At least occasionally, every landfill has objectionable odors emanating from the facility. As one expert noted, "The trick is, how can you treat it." The technical witnesses who addressed this issue agree that the breakdown of drywall, wall board, and gypsum board, all commonly recycled at C & D facilities, will produce hydrogen sulfide, which has a very strong "rotten egg" type smell. The most effective techniques for reducing or eliminating these odors are to spray reactant on the affected areas, place more cover, such as dirt or hydrated lime, on the pile, and have employees routinely

patrol the perimeters of the property and the active cell to report any odors that they smell.

43. Although the facility has been accepting waste products for a number of years, the last seven by Respondent, there is no evidence that the Department was aware of any odor complaints before April 2014. While not an active participant in the operations until recently, Mr. Miller also testified that he was unaware of any citizen complaints being reported to the facility prior to that date. However, in response to citizen complaints that more than likely were directed initially to the County, on April 14, 21, and 24, 2014, the Department conducted routine inspections of the facility. During at least one of the visits, objectionable odors were detected both on-site, emanating from cell 2, and off-site on West Pinestead Road, just north of the facility. See Dept. Ex. 14. Because the inspector created a single report for all three visits, he was unsure whether odors were detected on more than one visit. After the inspection report was generated, Department practice was to send a copy by email to the facility's former manager, Mr. Davidson.

44. A Department engineer who accompanied the inspector on at least one visit in April 2014 testified that she has visited the site on several occasions, and on two of those visits, the odor was strong enough to make her physically ill.

45. On a follow-up inspection by the Department on May 22, 2014, the inspector did not detect any objectionable odors. See Dept. Ex. 17. In June 2014, however, a County inspector visited the Wedgewood Center area in response to a complaint that dust was coming from the facility. He testified that he detected a rotten egg type smell on the Wedgewood Center property.

46. At a meeting attended by Mr. Miller and County and Department representatives on June 17, 2014, the Department advised Respondent of its findings and provided Mr. Miller with copies of the inspection reports.

47. On July 1, 2014, the Department conducted a follow-up inspection of the facility. The inspector noted a hydrogen sulfide odor on the north, south, and west sides of the disposal area of the facility, and on the top of the disposal pile at the facility. See Dept. Ex. 18. Another inspection conducted on July 9, 2014, did not find any objectionable odors. See Dept. Ex. 19.

48. On July 18, 2014, the Department conducted a follow-up inspection of the facility. The inspector again noted objectionable odors at the facility but none off-site. Id.

49. On July 24, 2014, Department inspectors noted objectionable odors on top of the pile, the toe of the north slopes, and off-site on West Pinestead Road. See Dept. Ex. 20. An inspection performed the following day noted objectionable

odors on top of the pile and the toe of the north slopes, but none off-site. Id. The Notice, which was already being drafted in mid-July, was issued a week later.

50. In response to the meeting on June 17, 2014, Respondent prepared a draft odor remediation plan, made certain changes suggested by the Department, and then submitted a revised odor remediation plan prior to July 31, 2014. A Department engineer agrees that "in the strict sense it meets the requirements of the rule" and "could work," but there are "two or three things that still needed . . . to be submitted in order for it to be completely approvable." For example, she was uncertain as to how and when dirt cover would be applied, and how erosion would be controlled. Although the plan was filed, it was never formally approved or rejected, and the "two or three things" that the witness says still needed to be done were never disclosed to Respondent. Under these circumstances, it is reasonable to accept Respondent's assertion that it assumed the plan was satisfactory and complied with the rule.

51. After the Notice was issued, Respondent set up a hotline for community members to call and report odors. A sign on the property gives a telephone number to call in the event of odors. At an undisclosed point in time, Respondent began requiring employees to walk the perimeter of the facility each day to monitor for odors; spreading and mixing hydrated lime to

reduce the odors around the facility; and increasing the amount of cover applied to the working face of the facility. The parties agree that these measures are the best available practices to monitor and eliminate objectionable odors at a C & D facility. Despite these good faith measures, Mr. Miller acknowledged that he visited the facility during the evening a few days before the final hearing in December 2014 and smelled hydrogen sulfide around the ECUA sewer pipe and "a very mild level" by the debris pile.

52. Respondent does not deny that odors were emanating from the facility during the months leading up to the issuance of the Notice. But in April 2014, the County experienced a 500-year storm event which caused significant flooding and damaged a number of homes. Because Respondent operates the only C & D facility in the County and charges less than the County landfill, it received an abnormal amount of soaked and damaged C & D debris, which it contends could have generated some, if not all, of the odors that month. Given the magnitude of the storm, this is a reasonable explanation for the source of the odors at that time.

53. Respondent also presented evidence that an underground ECUA sewer pipe that runs on the eastern side of the property was damaged during the storm, causing it to rupture and be exposed. Although ECUA eventually repaired the damaged pipe at

a later date, the pipe is still exposed above ground. Until the pipe was repaired, Respondent's assumption that it likely contributed to some of the odors detected by the Department appears to be valid. Finally, Respondent's expert attributes some of the odors to biological degradation from other sources both on-site and off-site, including a large wetland area running through the middle of the property. To a small degree, County testing later that fall confirms this assertion.

54. The County has also been an active participant in the odor complaint issue. In response to complaints received from residents of Wedgewood, in July 2014 it began collecting hydrogen sulfide data using a device known as the Jerome 631X Hydrogen Sulfur Detector. This equipment is used to monitor for the presence of hydrogen sulfur.

55. On July 21 and 22, 2014, samples were taken documenting that hydrogen sulfide was coming from the facility. In early September the County set up a fixed station at the Wedgewood Center, around 500 feet from the edge of Respondent's property, to continuously and automatically collect the data. During September and October 2014 the detector reported the presence of hydrogen sulfide at that location 64 percent of the days in those months, and this continued into the month of November. Seventy-five percent of the exceedances occurred when wind was blowing from the south, or when winds were calm. The

data also reflected that when the wind was blowing from the meter to the facility, or to the south, hydrogen sulfide was still detected on some occasions.

56. A resident of the Wedgewood community testified that on multiple occasions she has smelled objectionable odors in her home and yard and at the Wedgewood Center, and that these odors have been emanating from the facility for a number of years. Because of the odors, she says fewer citizens are participating in programs hosted by the Wedgewood Center.[3/]

57. The evidence establishes that before the Notice was issued, Respondent filed an odor remediation plan that was never rejected; therefore, the allegation that a plan was not submitted has not been proven. However, objectionable odors were detected off-site in June and July 2014, or after the April inspection reports were provided to the facility, and they continued throughout much of the fall. Therefore, the Department has established that the plan was not properly implemented. These same findings sustain the allegation that steps were not immediately taken to reduce the objectionable odors.

G. Counts VI and VII - Disposal and Failure to Remove Unauthorized Waste

58. Counts VI and VII allege that on April 14, 2014, the Department documented the disposal of prohibited or unauthorized

waste, including waste tires; and that on July 18, 2014, the Department conducted a follow-up inspection that documented the disposal of unauthorized waste, including waste tires, clothing, shoes, and Class I waste, including one electronic item and a grill, in violation of rule 62-701.730(4)(d).

59. The Permit specifies that the facility can only accept for disposal C & D debris. See § 2, Spec. Cond. C.2. Another condition provides that if unauthorized debris is spotted after a load is received, the unpermitted waste should be removed and placed in temporary storage in a bin at the sorting area. See § 2, Spec. Cond. C.3. The Operations Plan spells out these procedures in great detail.

60. Photographs received in evidence show that during the inspection on April 14, 2014, the following unauthorized items were observed at the facility: tires, a basketball goal, Quiklube material, chromated copper arsenate treated wood, a toy, and a crushed electronic item. See Dept. Ex. 22.

61. Photographs received in evidence show that during an inspection on July 18, 2014, the following unauthorized items were observed at the facility: blanket or clothing, a shoe, a bag of Class I garbage, several bags of household garbage, furniture, an electronic item and garbage, drilling mud, a suitcase, and tires. See Dept. Ex. 23.

62. Respondent's expert, who has trained numerous spotters, including a current Department inspector, established that a de minimis amount of unpermitted waste, which is easily hidden in the debris, is not unusual and would not constitute a violation of the rule. For example, when a building is torn down, numerous thermostats containing mercury vile will be in a C & D container but very difficult to see. Also, workers at construction sites may throw small amounts of leftover food in the pile of debris that goes to the facility. However, he agrees that most, if not all, of the items observed during the two inspections would not be considered de minimis.

63. Respondent does not deny that the unauthorized waste was present on two occasions. However, it contends that one would expect to find some of the items in a C & D dumpster. It also argues that the amount of unauthorized waste was minimal and not so serious as to warrant revocation of its Permit.

64. The evidence supports a finding that on two occasions Respondent violated two conditions in its Permit by accepting non-C & D waste and failing to remove it. Therefore, the charges in Counts VI and VII have been proven.

H. Count VIII - Facility Outside of Permitted Dimensions

65. This Count alleges that on May 22, 2014, the Department conducted an inspection of the facility in response to a complaint that Respondent had disposed of solid waste

outside its permitted (vertical) limit of 130 NGVD; that on July 25, 2014, the Department had a survey performed at the facility that confirmed this violation; and that this activity violated section 2.3 of the facility's Operation Plan and Specific Condition C.10 in the Permit.

66. Section 2.3 provides that "the proposed upper elevation of waste at the [facility] will range up to 130-feet, NGVD, which is slightly above original grade[,]" while Specific Condition C.10 provides that "[t]he final (maximum) elevation of the disposal facility shall not exceed 130 feet NGVD as shown on Attachment 3 - Cell 2 Closure Grading Plan."

67. Respondent admits that on July 25, 2014, the maximum height of the disposal pile exceeded 130 feet NGVD. However, it argues that, pursuant to Specific Condition C.10, which in turn refers to the Permit's Cell 2 Closure Grading Plan, the 130-foot height limitation comes into play only when cell 2 is being closed and is no longer active. This interpretation of the conditions is rejected for at least two reasons. First, a disposal pile in excess of the established height would trigger concerns about the integrity of the foundation of the facility. When the 130-foot ceiling was established by the Department at the permitting stage, it was based on calculations that the ground could support the weight of the waste. Second, the facility's financial assurance calculations are based on a set

dimension of the site; these calculations would likely be impacted if there were no height restrictions. The Department's interpretation is more reasonable and limits the height of the pile to no more than 130 feet NVGD at any time when the cell is active.

68. The Department has established that Respondent violated Permit conditions by disposing of waste outside its maximum permitted height of 130 feet NVGD.

69. To Respondent's credit, its new consultant, Charles Miller, completed preparation of a height reduction plan on September 3, 2014. See Resp. Ex. 4. Although Mr. Miller says the plan was being implemented at the time of final hearing, it has never been formally submitted to the Department for approval. Under the plan, Respondent proposes to extract all of the existing waste from the pile in the next two years. To reduce the volume of new waste being accepted, Respondent recently purchased a Caterpillar bulldozer, low-speed grinder, and Trommel screener. New waste will be shredded, screened to separate sand and dirt from the material, and then ground and compacted. Mr. Miller anticipates that the facility can achieve up to an eight to one (or at a minimum a five to one) reduction in the size of the waste. This will dramatically reduce the height of the pile and bring it well below 130 feet at closure. But whether cell 2 is now below 130 feet NGVD is unknown. In

any event, these proposed remediation steps should be taken into account in assessing an appropriate penalty.

CONCLUSIONS OF LAW

70. Section 403.087(7)(b) authorizes the Department to revoke any permit issued if it finds that the permit holder has "[v]iolated law, department orders, rules, or conditions that directly relate to the permit." See also Fla. Admin. Code R. 62-4.100(3)(b); § 403.704(10), Fla. Stat.

71. The Department argues that it must prove the allegations in the Notice by a preponderance of the evidence. Respondent asserts that the charges should be proven by clear and convincing evidence. Neither party has cited an administrative decision or appellate case that directly addresses this issue, probably because section 403.087(7) is an enforcement tool that is rarely used. Notably, most of the charges in the Notice were admitted by Respondent, and much of its evidence was to mitigate those violations.

72. Section 120.57(1)(j) provides that "[f]indings of fact shall be based on a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute." Unlike an enforcement action under section 403.121(2)(d), the Legislature did not provide a burden of proof to be applied in revocation proceedings under section 403.087(7). By definition, however, the term "license"

includes a permit and "licensing" includes the agency process of revocation. See § 120.52(10) and (11), Fla. Stat. Also, permit revocation proceedings are penal in nature. Thus, the proceeding can be fairly characterized as a "penal or licensure disciplinary proceeding" because Respondent has contested the Department's decision to revoke its permit.

73. Case law makes a distinction between proceedings in which sanctions involving a professional license are being sought and other licensure disciplinary proceedings. In a professional license setting, sanctions against the licensee must be proven by clear and convincing evidence. See, e.g., Dep't of Banking & Fin. v. Osborne, 670 So. 2d 932 (Fla. 1996). In contrast, a C & D permit is not a professional license and does not implicate the loss of livelihood. And, section 403.087 specifically provides that a permit issued under that provision "shall not become a vested interest in the permittee." Where these circumstances are present, at least one court has held that the proper standard of proof is preponderance of the evidence. See Haines v. Dep't of Children and Families, 983 So. 2d 602 (Fla. 5th DCA 2008)(where statute provides that a foster care license does not create a property right in the recipient, a preponderance of the evidence is the appropriate standard to use in a license revocation proceeding).[4/] But no matter which

standard is used, the Department has proven the charges set forth below by clear and convincing evidence.

74. In a ruling at hearing, the undersigned denied the Department's motion in limine that would preclude Respondent from presenting evidence in mitigation of the charges. In its PRO, the Department again argues that this proceeding is limited to nothing more than proving (or disproving) that the permit holder committed the alleged violations. It points out that, unlike section 403.121(10), section 403.087 does not require it to consider mitigating factors before revoking a permit.

75. The Department has allowed mitigating evidence in at least two permit revocation proceedings. See Dep't of Envtl. Prot. v. Mahon, Case No. 11-2276 (Fla. DOAH Dec. 30, 2011; Fla. DEP Mar. 20, 2012); Dep't of Envtl. Reg. v. Vail, Case No. 87-4242 (Fla. DOAH Mar. 11, 1988; Fla. DER May 11, 1988). While the Department cites four revocation cases in which it contends mitigating evidence was not allowed, all are distinguishable. In three cases, the permit holder did not request a hearing. The fourth case was decided primarily on a stipulation of facts submitted by the parties. The Recommended and Final Orders do not say one way or the other whether evidence of mitigation was presented. See Dep't of Envtl. Reg. v. City of North Miami, Case No. 80-1168, 1981 Fla. ENV LEXIS 24 (Fla. DOAH Feb. 24, 1981; DER Mar. 18, 1981). The undersigned is persuaded that the

concept of due process accords a permit holder the right to present evidence of mitigation. The ruling on the motion in limine is reaffirmed.

76. By clear and convincing evidence, the Department has proven that Respondent exceeded surface water quality standards for all analytes except nickel, as alleged in paragraph 6 of Count I; that it failed to timely implement an RAP, as alleged in Count II; that it failed to timely provide adequate financial assurance for the facility, as alleged in Count III; that it failed to provide financial assurance for corrective action, as alleged in Count IV; that it failed to timely take steps to reduce objectionable odors, and it failed to timely implement a routine odor monitoring program, as alleged in Count V; that it disposed of unauthorized waste, as alleged in Count VI; that it failed to remove unauthorized waste, as alleged in Count VII; and that it disposed of solid waste outside of its permitted dimension of 130 feet NGVD, as alleged in Count VIII. The remaining charges should be dismissed.

77. Section 403.087(7) provides that the Department "may" revoke any permit if it finds that the permit holder has "violated law, department orders, rules, or regulations, or permit conditions." The Department has steadfastly contended that the Permit should be revoked. On the other hand, Respondent recommends that it be given a date certain on which

to obtain a bond, placed on probation for a specified period of time, required to reduce the height of cell 2 below 130 feet NGVD by a date certain, and required to continue to follow Permit conditions related to monitoring, screening of waste, and implementation of the RAP. In short, Respondent is seeking a new set of deadlines to replace those first established in November 2012 and February 2013 by the Consent Order and Permit, respectively.

78. The troubling aspect of this case is Respondent's across-the-board failure to adhere to a number of deadlines and Permit conditions established several years ago, and to make any serious effort to comply with those requirements until it was faced with possible revocation of its Permit. Perhaps this was due to negligence and/or inattention by the former manager, who was replaced in June 2014, but this does not excuse its conduct. At the same time, the undersigned recognizes that once the Notice was issued, with a new manager at the helm, Respondent has invested a large amount of capital to purchase new equipment and retain new consultants in an effort to bring the facility into compliance. Even so, the date on which full compliance can be achieved cannot be predicted.

79. While revocation of the Permit seems especially harsh, and the undersigned would impose a less draconian measure than revocation given the evidence of mitigation, the Department has

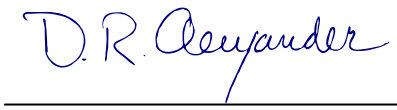
established the facts necessary to take that action. Accordingly, Respondent's Permit should be revoked.

RECOMMENDATION

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

RECOMMENDED that the Department of Environmental Protection enter a final order revoking Respondent's C & D Permit.

DONE AND ENTERED this 2nd day of March, 2015, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of March, 2015.

ENDNOTES

[1/] The County operates a large landfill that also accepts C & D waste products. However, it is located west of Pensacola on the Alabama state line, and the charges for using that service are higher than Respondent's charges.

[2/] The Department has a wide range of options in implementing its enforcement process, ranging from a noncompliance letter to a criminal referral. Thus, it has the discretion to use a notice of revocation under section 403.087(7).

[3/] A Wedgewood resident testified that she believes the facility has been contaminating her water supply. However, the water supply in the Wedgewood community is served by the City of Pensacola. There are no wells.

[4/] In contrast, where the imposition of an administrative fine is sought in an enforcement action under section 161.054, the Department must prove those charges by clear and convincing evidence. See, e.g., Withers v. Dep't of Envtl. Prot., Case No. 02-0621 (Fla. DOAH Jan. 9, 2003; Fla. DEP Feb. 21, 2003).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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