

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MW HORTICULTURE RECYCLING FACILITY,
INC.,

Petitioner,

vs.

Case No. 19-5636

DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondent.

_____/

MW HORTICULTURE RECYCLING OF
NORTH FT. MYERS, INC.,

Petitioner,

vs.

Case No. 19-5642

DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondent.

_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held before Francine M. Ffolkes, the assigned Administrative Law Judge of the Division of Administrative Hearings (DOAH), on March 5 and 6, 2020, in Fort Myers, Florida.

APPEARANCES

For Petitioners: Clayton W. Crevasse, Esquire
Sarah E. Spector, Esquire
Roetzel & Andress
2320 First Street, Suite 1000
Fort Myers, Florida 33901

For Respondent: Carson Zimmer, Esquire
Department of Environmental Protection
Mail Station 49
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUES

The issues for determination in this matter are: (1) whether Petitioner, MW Horticulture Recycling Facility, Inc. (MW), is entitled to renewal of its Yard Trash Transfer Station or Solid Waste Organics Recycling Facility registration; (2) whether Petitioner MW is an irresponsible applicant; and (3) whether Petitioner MW Horticulture Recycling of North Fort Myers, Inc. (MW-NFM), is entitled to renewal of its Yard Trash Transfer Station or Solid Waste Organics Recycling Facility registration.

PRELIMINARY STATEMENT

On April 25, 2019, Petitioners, MW and MW-NFM, submitted their annual renewal Yard Trash Transfer Station or Solid Waste Organics Recycling Facility registration applications to the Department of Environmental Protection (Department). Petitioners' facilities are alternatively known as Source Separated Organics Processing Facilities (SOPFs). Petitioner MW's application was designated as file number SOPFD 19-02. Petitioner MW-NFM's application was designated as file number SOPFD 19-01. On August 22, 2019, the Department issued notices of denial for both registration application renewals.

On September 11, 2019, Petitioners timely filed petitions for administrative hearing challenging the registration denials. On October 18, 2019, the Department referred the petitions to DOAH to conduct an evidentiary hearing and submit a recommended order. DOAH consolidated the cases on October 31, 2019. The Department filed an Emergency Motion to

Strike Witnesses on March 3, 2020. On March 4, 2020, the Petitioners filed their motion to strike witnesses. Petitioners' motion was withdrawn at hearing; the Department's motion was denied. The parties filed their Joint Pre-hearing Stipulation on March 3, 2020.

At the final hearing, Petitioners presented the expert testimony of David Hill, who was tendered and accepted as an expert in compost and solid waste management; and Jeffrey Collins, who was tendered and accepted as an expert in fire prevention and suppression. Petitioners also presented the fact testimony of Denise Houghtaling, Mark Houghtaling, Mario Scartozzi, Deborah Schnellenger, Harshad Bhatt, and Rick Roudebush. Petitioners' Exhibits 3 (Lake Yard photos A, B, D through J, L, N, P, Q, T, BB, CC, DD; North Yard photos A, C, D, E, H, I, L, N; South Yard photos A, B, C, E, G, K, L through T, Z, AA, BB), 6 (page 2 only), 9 through 14, 16, 20, 22, 25, and 26, were admitted into evidence.

The Department presented the fact testimony of Lauren O'Connor; Vincent Berta; the expert testimony of Steve Lennon, who was tendered and accepted as an expert in fire prevention and suppression; Doug Underwood, who was tendered and accepted as an expert in fire prevention and suppression; and Renee Kwiat, who was tendered and accepted as an expert in solid waste and air quality. The Department's Exhibits 1 through 32 were admitted into evidence.

A three-volume Transcript of the hearing was filed with DOAH on March 27, 2020. The parties filed their Proposed Recommended Orders on April 16, 2020, which have been considered in the preparation of this Recommended Order.

References to Florida Statutes are to the 2019 version, unless otherwise stated.

FINDINGS OF FACT

The following Findings of Fact are based on the stipulations of the parties and the evidence adduced at the final hearing.

The Parties and the Registration Denials

1. Petitioner MW is a Florida corporation that operates an SOPF located at 6290 Thomas Road, Fort Myers, Lee County, Florida. The site is commonly referred to as the "South Yard."

2. Petitioner MW-NFM is a Florida corporation that operates an SOPF located at 17560 East Street, North Fort Myers, Lee County, Florida. The site is commonly referred to as the "North Yard."

3. The Department is the administrative agency of the state statutorily charged with, among other things, protecting Florida's air and water resources. The Department administers and enforces certain provisions of part IV of chapter 403, Florida Statutes, and the rules promulgated thereunder in Florida Administrative Code Chapters 62-701 and 62-709. Pursuant to that authority, the Department determines whether to allow SOPFs to annually register in lieu of obtaining a solid waste management facility permit.

4. On April 25, 2019, Petitioner MW submitted its application for registration renewal for the South Yard. On August 22, 2019, the Department issued a notice of denial. The listed reasons for denial focused on non-compliance with orders for corrective action in a Consent Order (Order) between Petitioner MW and the Department entered on February 22, 2019. The Order was entered to resolve outstanding violations in a Notice of Violation, Orders for Corrective Action and Administrative Penalty Assessment (NOV), issued on November 20, 2018.

5. The notice of denial stated that, as of August 9, 2019, Petitioner MW had not completed the following corrective actions of the Order by the specified timeframes: (a) within 90 days of the effective date of this Order, Respondent shall remove all processed or unprocessed material (yard trash) from the Seminole Gulf Railway Right of Way and the swale along Old US 41 and establish a 20 foot wide all-weather access road, around the entire perimeter of the site; (b) within 90 days of the effective date of this Order, Respondent shall reduce the height of the piles to a height that the facility's equipment can reach without driving (mechanically compacting) onto the processed or unprocessed material; and (c) within 90 days of the effective date of this Order, Respondent shall have all the processed and unprocessed material be no more than 50 feet from access by motorized firefighting equipment.

6. The notice of denial also stated that when Department staff conducted compliance visits on April 29, 2019, June 27, 2019, July 7, 2019, and July 18, 2019, the following outstanding violations were documented: (a) unauthorized open burning of yard waste; (b) unauthorized mechanical compaction of processed and unprocessed material; (c) an all-weather access road, at least 20 feet wide, around the perimeter of the Facility has not been maintained and yard trash has been stored or deposited within the all-weather access road; and (d) yard trash is being stored more than 50 feet from access by motorized firefighting equipment.

7. On April 25, 2019, Petitioner MW-NFM submitted its application for registration renewal for the North Yard. On August 22, 2019, the Department issued a notice of denial. The notice of denial stated that compliance and site observation visits were conducted on July 9, 2019, July 30, 2019, August 1 and 2, 2019, and the following non-compliance issues were documented: (a) unauthorized open burning; (b) unauthorized mechanical compaction of processed and unprocessed material; (c) yard trash received has been stored or disposed of within 50 feet of a body of water; and

(d) yard trash received is not being size-reduced or removed, and most of the unprocessed yard trash has been onsite for more than six months.

8. The notice of denial also stated that on March 27, 2018, May 10, 2018, and October 3, 2018, Department staff conducted inspections of the North Yard. A Warning Letter was issued on November 2, 2018. The Warning Letter noted the following violations: (1) unauthorized burning of solid waste; (2) the absence of the required 20-foot-wide all-weather perimeter access road along the southern unprocessed yard trash debris pile; (3) inadequate access for motorized firefighting equipment around the southern unprocessed yard trash debris pile (lake pile); (4) the lake pile not size-reduced or removed within six months; (5) mechanical compaction of processed and unprocessed material by heavy equipment; and (6) yard trash storage setbacks from wetlands not maintained.

Petitioners' SOPFs

9. The North Yard is located in North Fort Myers and is bound by the southbound lanes of Interstate 75 to the east and a lake to the west. The South Yard is slightly larger than the North Yard and abuts Thomas Road to the west and a railroad owned and operated by the Seminole Gulf Railway Company to the east.

10. Petitioners' facilities accept vegetative waste and yard trash (material) from the public in exchange for a disposal fee before processing and size-reducing the material into retail products such as organic compost, topsoil, and mulch. The unprocessed material is staged in various piles generally according to waste type until it can be processed by grinding or screening.

11. As of the date of the final hearing, both the North Yard and the South Yard were completely full of large, tall, and long piles of processed and unprocessed material except for a perimeter roadway around each site and paths that meander between the piles themselves.

12. As the material in the piles decomposes, heat is produced from the respiration and metabolization of organic matter. This heat ignites the dry material and can cause substantial fires. Both the North Yard and South Yard are susceptible to fires caused by spontaneous combustion as a result of their normal operations of collecting and stockpiling organic waste.

Fires

13. Although spontaneous combustion is an inherent risk with SOPFs, the evidence at the hearing established that the material at Petitioners' facilities catches fire at an abnormally high rate as a result of poor pile management. Piles need to be turned and wetted to keep down incidents of spontaneous combustion. Monitoring temperatures, rotating the piles, and removing the material at a faster rate would help reduce the incidence of fires. Large piles with no extra land space cannot be managed in a way "to aerate and keep the temperatures at a level where you're not going to have spontaneous combustion." *See Tr. Vol. I, pg. 32.*

14. Fire Marshal Steve Lennon of San Carlos Park Fire and Rescue regarded the South Yard as a fire hazard compared to other similar sites in his district. He testified that the pile heights, widths, and lengths at the South Yard are not in compliance with applicable fire-code size requirements. He also testified that if the pile sizes were in compliance, Petitioner MW would not have to put their motorized firefighting equipment on top of the piles "because [they] would be able to reach it from the ground." *See Tr. Vol. I, pg. 41.*

15. As of the date of the hearing, San Carlos Park Fire and Rescue had responded to 43 active fire calls at the South Yard in the last two years, and three times in 2020 alone. In 2018, the active fire calls at the South Yard were multi-day suppression operations. In 2019, the active fire calls were mostly hotspots and flare-ups.

16. Captain Doug Underwood of the Bayshore Fire Rescue and Protection Service District (Bayshore Fire District) testified that his department had

responded to approximately 75 fire calls at the North Yard in the last two years. The most common cause of the fires was spontaneous combustion. The piles were not in compliance from a size standpoint.

17. Captain Underwood testified that the majority of the 75 calls were to the lake pile at the North Yard. *See* Tr. Vol. I, pg. 59. The lake pile was a temporary site on the southern end of the lake that borders the North Yard, and for most of 2018 and 2019, contained debris from Hurricane Irma.¹ The lake pile temporary site was completely cleared by the time of the hearing.

18. Captain Underwood testified that in 2018, he recommended to Petitioners that they engage the services of an expert fire engineer. Petitioners engaged Jeff Collins who met with Captain Underwood on multiple occasions. They discussed how to address fires and hotspots and that the facilities should have a written fire protection safety and mitigation plan. Such a plan was created and Captain Underwood was satisfied with its provisions.

19. Although the lake pile temporary site was completely cleared by the time of the hearing, it was not an entirely voluntary effort on Petitioners' part. Captain Underwood testified that Petitioners' "initial plan of action was to leave it there for . . . eight months or greater, depending on the time frame needed to have the product decompose and cool down to a temperature that they could remove it." *See* Tr. Vol. I, pg. 83. It took Lee County code enforcement efforts "to compel MW to remove this material off-site as quickly as possible." *See* Tr. Vol. I, pg. 82.

¹ Throughout this proceeding, the lake pile was referred to by various names in testimony and exhibits, such as, "southern unprocessed yard trash debris pile," "lake yard," "trac[t] D," and "temporary site."

20. As recently as February 12, 2020, a large pile of hardwood, green waste, and compost at the North Yard caught fire as a result of spontaneous combustion. The size of the fire was so large and hot that the Bayshore Fire District could not safely extinguish the fire with water or equipment, and allowed it to free-burn openly for 24 hours in order to reduce some of the fuel.

21. The fire produced smoke that drifted across the travel lanes of Interstate 75. The free-burn allowed the pile to reduce in size "down to the abilities of the district and the equipment on-site." *See* Tr. Vol. I, pgs. 51-52. Captain Underwood testified that "once we started putting water on it, then the MW crews with their heavy equipment covered the rest of the smoldering areas with dirt." *See* Tr. Vol. I, pg. 56.

Rule Violations

22. By Petitioners' own admission, the facilities have repeatedly violated applicable Department rules throughout the course of their operations over the last two and one-half years. The most pertinent of these violations center around the Department's standards for fire protection and control to deal with accidental burning of solid waste at SOPFs.

23. Renee Kwiat, the Department's expert, testified that the Department cited the South Yard nine times for failing to maintain a 20-foot all-weather access road. The South Yard consistently violated the requirement to maintain processed and unprocessed material within 50 feet of access by motorized firefighting equipment, and the North Yard has violated this requirement twice. The North Yard consistently violated the requirement to size-reduce or remove the lake pile material within six months. Both the North Yard and South Yard were cited multiple times for mechanically compacting processed and unprocessed material.

24. Following a period of noncompliance and nearly 11 months of compliance assistance at the South Yard, Petitioner MW told the Department it would resolve all outstanding violations by July 1, 2018. The July 1, 2018, deadline passed and on October 18, 2018, the Department proposed a consent

order to resolve the violations at the South Yard. However, Petitioner MW did not respond.

25. On November 20, 2018, the Department issued the NOV to Petitioner MW regarding the South Yard. The violations included failure to maintain a 20-foot all-weather access road around the perimeter of the site, failure to ensure access by motorized firefighting equipment, mechanical compaction, and the unauthorized open burning of solid waste. On February 22, 2019, the Department executed the Order with Petitioner MW to resolve outstanding violations in the NOV.

26. By signing the Order, Petitioner MW agreed to undertake the listed corrective actions within the stated time frames. Compliance visits to the South Yard on April 29, 2019, June 7, 2019, June 27, 2019, July 18, 2019, and August 22, 2019, documented that many violations outlined above were still present at the site.

27. At the time of the final hearing, the preponderance of the evidence established that none of the time periods in the Order were met. The preponderance of the evidence established the violations listed in paragraphs 5 and 6 above.

28. At the time of the final hearing, the preponderance of the evidence established that Petitioner MW still had not reduced the height of the piles such that their equipment could reach the tops of the piles without driving (mechanically compacting) onto the processed or unprocessed material. Thus, all the processed and unprocessed material was not more than 50 feet from access by motorized firefighting equipment.

29. At the time of the final hearing, the preponderance of the evidence established more incidents of unauthorized open-burning of solid waste; and continuing unauthorized mechanical compaction of processed and unprocessed material. The evidence also established that the South Yard does not encroach on Seminole's real property interest.

30. The Department did not issue an NOV for the North Yard. The preponderance of the evidence established that there were repeated rule violations at the North Yard. These violations formed the basis for denying the North Yard's registration as outlined in paragraph 8 above.

31. The Department deferred to Lee County's enforcement action for violations of County rules as resolution of the violations of Department rules. At the time of the final hearing, however, the preponderance of the evidence established more incidents of unauthorized open burning of solid waste, and continuing unauthorized mechanical compaction of processed and unprocessed material at the North Yard.

Petitioners' Response and Explanation

32. Approximately two and one-half years before the date of the hearing in this case, Hurricane Irma, a category four hurricane, made landfall in the state of Florida. It was September 10, 2017, and Hurricane Irma significantly impacted the southwest coast of Florida, where Petitioners' facilities are located.

33. Hurricane Irma caused extensive damage, including the destruction of trees, vegetation, and other horticultural waste which required disposal. Massive amounts of such yard waste and horticultural debris were deposited on roadways and streets throughout Lee County, creating a significant issue that needed to be addressed by local governments, and state and federal agencies.

34. Due to the threat posed by Hurricane Irma, the state of Florida declared a state of emergency on September 4, 2017, for every county in Florida. This state of emergency was subsequently extended to approximately March 31, 2019, for certain counties, including Lee County, due to the damage caused by Hurricane Irma.

35. An overwhelming volume of material needed to be processed and disposed of following Hurricane Irma. The Petitioners' facilities were inundated with material brought there by Lee County, the Florida Department of Transportation, the Federal Emergency Management Agency, and others.

36. After Hurricane Irma, haulers took considerable time just to get the materials off the streets, and processors like the Petitioners, ran out of space because there was limited space permitted at the time. As a result, these materials stacked up and had to be managed over time at facilities, including Petitioners' facilities.

37. To accommodate the material, Petitioner MW-NFM added the temporary site that was labeled the "lake pile" or "southern unprocessed yard trash debris pile" in Department inspection and compliance reports of the North Yard.

38. In order to address the volume of material on the site after Hurricane Irma, Petitioner MW-NFM requested approval from the Department to move the material off-site to other locations in order to reduce the size of the piles at the North Yard's lake pile. For reasons that remain unclear, such authorization was not obtained, and Petitioner MW-NFM believes that this would have size-reduced the piles and prevented accumulation of material in violation of Department rules.

39. In order to process the North Yard's lake pile and move it off-site more quickly, Petitioner MW-NFM requested permission from Lee County and the Department to grind unprocessed material on site, which would have size-reduced the lake pile and allowed it to be moved off-site more quickly. Because existing zoning did not authorize this grinding, the request was denied in spite of the fact that a state of emergency had been declared which Petitioner MW-NFM believes would have permitted such an activity. This further hampered Petitioner MW-NFM's ability to size-reduce the lake pile leading to more issues with hot spots and fires.

40. Because the material was of such volume, and was decomposing, a major fire erupted in 2018 at the North Yard's lake pile. Petitioners' fire safety engineer, Jeff Collins, wrote reports to address this issue and recommended to the local fire department that the pile be smothered in dirt until the fire was extinguished. The request was denied by the Bayshore Fire District, which instead directed that Petitioners break into the pile in order to extinguish the fire. When Petitioners did so, the piles immediately erupted into flames as predicted by Petitioners' fire safety engineer. Moving the smoldering material to the South Yard also led to fires at the South Yard.

41. In spite of the large volume of material at the North Yard's lake pile, Petitioners made steady progress in size reducing the material and moving it off-site. However, as of the date of the final hearing, both the North Yard and the South Yard were still completely full of large, tall, and long piles of processed and unprocessed material except for a perimeter roadway around each site and paths that meandered between the piles themselves.

Mechanical Compaction

42. Each party presented testimony regarding the question of whether Petitioners' facilities violated the prohibition that any processed or unprocessed material shall not be mechanically compacted. The parties disagreed over how the prohibition against mechanical compaction was applied to yard trash transfer facilities. In March of 2018, Petitioners' representative, Denise Houghtaling, wrote an email to the Department requesting clarification of the Department's definition of "mechanical compaction" because it is undefined in the rules.

43. On April 3, 2018, Lauren O' Connor, a government operations consultant for the Department's Division of Solid Waste Management, responded to Petitioners' request. The response stated that the Department interprets "mechanical compaction" as the use of heavy equipment over processed or unprocessed material that increases the density of waste material stored. Mechanical compaction is authorized at permitted disposal

sites and waste processing facilities, but is not permissible under a registration for a yard trash transfer facility.² Mechanical compaction contributes to spontaneous combustion fires, which is the primary reason for its prohibition at yard trash transfer facilities.

44. Petitioners' interpretation of mechanical compaction as running over material in "stages" or "lifts" was not supported by their expert witnesses. Both David Hill and Jeff Collins agreed with the Department's interpretation that operating heavy equipment on piles of material is mechanical compaction.

45. The persuasive and credible evidence established that Petitioners mechanically compact material at their facilities. Mechanical compaction was apparent at both sites by either direct observation of equipment on the piles of material, or by observation of paths worn into the material by regular and repeated trips. Department personnel observed evidence of mechanical compaction on eight separate inspections between December 2017 and January 2019. Additional compaction was observed at the South Yard on June 7, 2019, and in aerial surveillance footage from August 28, 2019, September 5, 2019, January 30, 2020, and February 12, 2020.

46. Petitioners' fire safety engineer, who assisted them at the North Yard lake pile, testified that the fire code required access ramps or pathways for equipment onto the piles in order to suppress or prevent fire. However, Captain Underwood and Fire Marshal Lennon testified they do not and have never required Petitioners to maintain such access ramps or paths on the piles. The fire code provision cited by Petitioners' expert does not apply to their piles. *See* Tr. Vol. II, pgs. 78-80. In addition, Fire Marshal Lennon testified that placing firefighting equipment on top of piles is not an acceptable and safe way to fight fires at the site by his fire department.

² Rule 62-701.710 prohibits the operation of a waste processing facility without a permit issued by the Department. *See also* Fla. Admin. Code R. 62-701.803(4). Rule 62-701.320(16)(b) contemplates the availability of *equipment* for excavating, spreading, *compacting*, and covering waste at a permitted solid waste disposal facility.

47. Despite receiving clarification from the Department in April of 2018, Petitioners choose to ignore the Department's prohibition against mechanically compacting unprocessed or processed material piles. In addition, the persuasive and credible evidence suggests that Petitioners blanket the piles with dirt to both suppress fires and accommodate the "access roads" or "paths" on the piles.³

Ultimate findings

48. The persuasive and credible evidence established the violations cited in the Department's registration denial for the North Yard. The Department also established by a preponderance of the evidence the alleged subsequent violations through to the time of the final hearing.

49. The persuasive and credible evidence established the violations cited in the Department's registration denial for the South Yard. The Department also established by a preponderance of the evidence the alleged subsequent violations through to the time of the final hearing.

50. The persuasive and credible evidence established that Petitioners did not consistently comply with Department rules over the two and one-half years prior to the final hearing. However, Petitioners established through persuasive and credible evidence that because of the impacts of Hurricane Irma, and the subsequent circumstances, they could not have reasonably prevented the violations. The totality of the evidence does not justify labeling the Petitioners as irresponsible applicants under the relevant statute and Department rule.

51. However, Petitioners did not provide reasonable assurances that they would comply with Department standards for annual registration of yard trash transfer facilities.

³ The evidence suggests that Petitioners may prefer to follow the advice of their hired experts with regard to the practice of mechanical compaction and blanketing the piles with dirt. *See, e.g.*, Petitioners' Ex. 16. However, the evidence suggests that the experts' level of experience is with large commercial composting and recycling facilities that may be regulated by solid waste management facility permits and not simple annual registrations.

CONCLUSIONS OF LAW

Nature and Scope of this Proceeding

52. This is a de novo proceeding for the purpose of formulating final agency action. *See Capeletti Bros. v. Dep't of Gen. Servs.*, 432 So. 2d 1359, 1363-64 (Fla. 1st DCA 1983).

Burden and Standard of Proof

53. Petitioners, as the applicants for the registrations, have the burden to prove that they are entitled to the registrations by meeting all applicable regulatory criteria. *See Fla. Admin. Code R. 62-709.320; Fla. Dep't of Transp. v. J.W.C. Co. Inc.*, 396 So. 2d 778 (Fla. 1st DCA 1981).

54. Rule 62-701.320(9) directs the Department to deny a solid waste permit if reasonable assurance is not provided that the requirements of chapters 62-4 and 62-701 will be satisfied. *See also Fla. Admin. Code R. 62-4.070(2)*. A solid waste permit may include registrations. *See § 403.707(1), Fla. Stat.*

55. Findings of fact must be based on a preponderance of the evidence. *See § 120.57(1)(j), Fla. Stat.*

Registration Criteria

56. Rule 62-709.320(1)(a) states that owners or operators of yard trash processing facilities, facilities composting vegetative waste, animal byproducts or manure with or without yard trash, and manure blending operations that meet the criteria of rules 62-709.320, 62-709.330, and/or 62-709.350, shall register with the Department in lieu of obtaining a solid waste management facility permit. It further states that if these criteria are not met, then a solid waste management facility permit is required in accordance with chapter 62-701 for disposal operations, or with chapter 62-709 for recycling operations.

57. Rule 62-709.320(2) sets forth the design and operating criteria that must be met by a facility seeking to register in lieu of obtaining a solid waste management facility permit. The rule provides:

(2) Design and operating requirements.

(a) The facility shall have the operational features and equipment necessary to maintain a clean and orderly operation. Unless otherwise specified in Rule 62-709.330 or 62-709.350, F.A.C., these provisions shall include:

1. An effective barrier to prevent unauthorized entry and dumping into the facility site;
2. Dust and litter control methods; and,
3. Fire protection and control provisions to deal with accidental burning of solid waste, including:
 - a. There shall be an all-weather access road, at least 20 feet wide, all around the perimeter of the site,
 - b. None of the processed or unprocessed material shall be mechanically compacted; and,
 - c. None of the processed or unprocessed material shall be more than 50 feet from access by motorized firefighting equipment.

(b) The facility shall be operated in a manner to control vectors.

(c) The facility shall be operated in a manner to control objectionable odors in accordance with subsection 62-296.320(2), F.A.C.

(d) Any drains and leachate or condensate conveyances that have been installed shall be kept clean so that flow is not impeded.

(e) Solid waste received at a registered facility must be processed timely as follows:

1. Any yard trash, including clean wood, received at the facility shall be size-reduced or removed within 6 months, or within the period required to receive 3,000 tons or 12,000 cubic yards, whichever is greater. However, logs with a diameter of 6 inches or greater may be stored for up to 12 months before they are size-reduced or removed, provided the logs are separated and stored apart from other materials onsite.

2. Any putrescible waste such as vegetative wastes, animal byproducts or manure received at a facility shall be processed and incorporated into the composting material, or removed from the facility, within 48 hours of receipt.

(f) If any of the following materials are discovered, they shall be immediately containerized and removed from the facility: treated or untreated biomedical waste; hazardous waste; or any materials containing a polychlorinated biphenyl (PCB) concentration of 50 parts per million or greater.

(g) When a registered facility ceases operation, all residuals, solid waste, and recyclable materials shall be removed from the site and recycled, or disposed of pursuant to the requirements of Chapter 62-701, F.A.C. Any remaining processed material shall be used in accordance with the requirements of this rule or disposed of pursuant to the requirements of Chapter 62-701, F.A.C.

58. Petitioner MW did not prove by a preponderance of the evidence that it would meet the design and operating requirements for yard trash processing facilities. More specifically, Petitioner MW did not provide reasonable assurances that it would meet the requirements that none of the processed or unprocessed material shall be mechanically compacted, and that none of the processed or unprocessed material shall be more than 50 feet from access by motorized firefighting equipment.

59. Petitioner MW-NFM did not prove by a preponderance of the evidence that it would meet the design and operating requirements for yard trash processing facilities. More specifically, Petitioner MW-NFM did not provide reasonable assurances that it would meet the requirements that none of the processed or unprocessed material shall be mechanically compacted, and that none of the processed or unprocessed material shall be more than 50 feet from access by motorized firefighting equipment.

60. Petitioners did not provide reasonable assurance that they can effectively control and prevent unauthorized open burning at the North Yard and South Yard. *See Fla. Admin Code R. 62-701.300(3).*

Irresponsible Applicant

61. Rule 62-701.320(3) defines an "irresponsible applicant" as one that "owned or operated a solid waste management facility in this state, including transportation equipment or mobile processing equipment used by or on behalf of the applicant, which was subject to a state or federal notice of violation, judicial action, or criminal prosecution for activities that constitute violations of chapter 403, F.S., or the rules promulgated thereunder, *and could have prevented the violation through reasonable compliance with Department rules.*" (Emphasis added).

62. The preponderance of the evidence established that Petitioners did not consistently comply with Department rules over the two and one-half years prior to the final hearing. However, Petitioners established through persuasive and credible evidence that because of the impacts of Hurricane Irma, and the subsequent circumstances, they could not have reasonably prevented the violations. The totality of the evidence does not justify labeling Petitioners as irresponsible applicants under the relevant Department rule.

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 denying Petitioners' annual registration renewal applications for the North Yard and South Yard.

DONE AND ENTERED this this 17th day of September, 2020, in Tallahassee,
Leon County, Florida.



FRANCINE M. FOLKES
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of September, 2020.

COPIES FURNISHED:

Clayton W. Crevasse, Esquire
Roetzel & Andress
2320 First Street, Suite 1000
Fort Myers, Florida 33901
(eServed)

Sarah E. Spector, Esquire
Roetzel & Andress
2320 First Street, Suite 1000
Fort Myers, Florida 33901
(eServed)

Carson Zimmer, Esquire
Department of Environmental Protection
Mail Station 49
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000
(eServed)

Lea Crandall, Agency Clerk
Department of Environmental Protection
Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000
(eServed)

Justin G. Wolfe, General Counsel
Department of Environmental Protection
Legal Department, Suite 1051-J
Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000
(eServed)

Noah Valenstein, Secretary
Department of Environmental Protection
Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000
(eServed)

NOTICE OF RIGHT TO SUBMIT 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.