STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Petitioner,	)	
vs.	)	**OGC CASE NO. 14-0415**
	)	**DOAH CASE NO. 14-3674**
SOUTH PALAFOX PROPERTIES, INC.,	)	
Respondent.	)	

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH), on March 2, 2015, submitted a Recommended Order (RO) to the Department of Environmental Protection (DEP or Department) in the above captioned proceeding. The RO is attached hereto as Exhibit A. The RO was copied to counsel for the Respondent, South Palafox Properties, Inc. (South Palafox), and to counsel for the DEP. On March 17, 2015, the parties filed their Exceptions to the RO. On March 27, 2015, the DEP responded to South Palafox's Exceptions. South Palafox did not file a response to the DEP's Exceptions. This matter is now before the Secretary of the Department for final agency action.

BACKGROUND

South Palafox is a Florida limited liability corporation that owns real property located at 6990 Rolling Hills Road, Pensacola, Escambia County, Florida. South Palafox operates a construction and demolition disposal facility (C & D) at the property, under the name of Rolling Hills Construction and Demolition Recycling Center. The C &

D operates 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 incorporated 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.

In an eight-count Notice of Violation issued on July 31, 2014, DEP proposed to revoke the C & D permit and close the facility for violating permit conditions and rules that govern the operation of the facility. These included failure to comply with certain time frames and deadlines required by the 2012 Consent Order. The Notice of Violation was issued under section 403.087(7)(b), Florida Statutes, 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." South Palafox timely requested an administrative hearing to challenge the proposed agency action. DEP referred the challenge to DOAH and an ALJ conducted an evidentiary hearing on December 9-11, 2014. A three-volume hearing transcript was filed, proposed recommended orders were submitted by the parties, and the ALJ subsequently issued the RO.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department enter a final order revoking the C & D permit. (RO at page 36). The ALJ concluded that DEP established the facts necessary to take that action under section 403.087(7), Florida Statutes. (RO ¶¶ 76, 79).

Burden of proof

The ALJ found that DEP proved most of the charges alleged in all eight counts of the Notice of Violation by clear and convincing evidence. (RO ¶¶ 19, 28, 36, 38, 57, 64, 67, 68, 73, 76). The ALJ noted DEP's argument that it must prove the allegations in the Notice of Violation by a preponderance of the evidence, and South Palafox's assertion that the charges should be proven by clear and convincing evidence. (RO ¶¶ 71-73). However, after statutory and case law analysis, the ALJ simply stated that "no matter which standard is used, the Department has proven the charges . . . by clear and convincing evidence." (RO ¶¶ 71-73).

Mitigation evidence

The DEP filed a motion in limine to preclude South Palafox from presenting evidence in mitigation of the charges. (RO ¶ 74). DEP argued that unlike section 403.121(10), Florida Statutes, section 403.087 does not require consideration of mitigating factors before revoking a permit. (RO ¶ 74). The ALJ denied DEP's motion in limine to preclude South Palafox from presenting mitigating evidence concerning circumstances surrounding the violations and efforts to remediate them after July 31, 2014. (RO ¶¶ 13, 74). The ALJ allowed DEP to present evidence to show that South Palafox's remediation efforts were not successful and that some violations still existed as of the date of the final hearing. (RO ¶ 13).

The ALJ found that South Palafox failed to adhere to a number of deadlines and permit conditions established several years ago, and to make any serious effort to comply until it was faced with possible permit revocation. (RO ¶ 78). The ALJ found that negligence and/or inattention by the former manager did not excuse this conduct. (RO ¶

78). The ALJ further found that once the Notice of Violation was issued, South Palafox replaced the manager, invested a large amount of capital to purchase new equipment, and retained new consultants in an effort to bring the facility into compliance. (RO ¶ 78). However, the ALJ found that the date on which full compliance can be achieved cannot be predicted. (RO ¶ 78). The ALJ concluded that while he would impose "a less draconian measure than revocation given the evidence of mitigation, the [DEP] established the facts necessary to take that action." (RO ¶ 79).

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2014); *Charlotte Cnty. v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61 (Fla. 1st DCA 2007).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See e.g., Rogers v. Dep't of Health,* 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.,* 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cnty. Sch. Bd.,* 652 So. 2d 894 (Fla. 2d. DCA 1995). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Tedder v. Fla. Parole Comm'n,* 842 So. 2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Also, the ALJ's decision to accept the testimony of one expert witness over that of another

expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting the decision. *See e.g., Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.,* 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of Health and Rehab. Servs.,* 462 So. 2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983).

An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *See, e.g., Pub. Employees Relations Comm'n v. Dade Cnty. Police Benevolent Ass'n*, 467 So. 2d 987, 989 (Fla. 1985); *Fla. Public Employee Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See, e.g., Falk v. Beard*, 614 So. 2d 1086, 1089 (Fla. 1993); *Dep't of Envtl. Regulation v. Goldring*, 477 So. 2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.,* 668 So. 2d 209, 212 (Fla. 1st DCA 1996). The Department administers and enforces the provisions of chapter 403, Florida Statutes, and the rules promulgated thereunder, including those applicable to C & D disposal facilities. (RO ¶ 1); *see also* § 120.57(1)(l), Fla. Stat. (2014) (agency can reject or modify a judge's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction").

Finally, in reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* § 120.57(1)(k), Fla. Stat. (2014). However, the agency need not rule on an exception that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

RULINGS ON DEP'S EXCEPTIONS

Prosecutorial Discretion

Section 403.087(7)(b), Florida Statutes, 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. (2014). The C & D permit was issued to South Palafox under chapter 403, Florida Statutes. Chapter 403 is a remedial statute designed to protect the environment, and is liberally construed to achieve that goal. *See State v. Hamilton*, 388 So. 2d 561, 563 (Fla. 1980). The statute protects the environment by requiring stationary installations that may be a source of contamination to operate pursuant to permits issued by the Department. *See* §§ 403.061(14) and 403.087, Fla. Stat. (2014).

In chapter 403, the Legislature authorizes the Department to pursue various enforcement remedies, including that the Department may revoke permits. *See, e.g.,* §§403.061(14), 403.087(7), 403.121, and 403.704(10), Fla Stat. (2014). The fact that chapter 403 contains some penal provisions does not change its character as a remedial statute enacted for the public benefit. *See, e.g., Ranger Insurance Co. v. Bal*

Harbour Club, Inc., 509 So. 2d 940, 943 (Fla. 3d DCA 1985). "The test most often articulated for determining whether a particular provision of legislation is penal in character is whether the legislative aim in providing the sanction was to punish the individual for engaging in the activity involved or to regulate the activity in question." *Id.* at 943; *see also W.M. v. Dep't of Health and Rehab. Servs.*, 553 So. 2d 274, 278 (Fla. 1st DCA 1989) (reflecting that while certain provisions of the statute may have a "penal effect" the statute was not designed to punish violators but protect the public).

It is well recognized that the choice of an enforcement remedy is committed to an administrative agency's discretion and is a matter of enforcement policy unsuitable for judicial review. *See Heckler v. Chaney,* 470 U.S. 821, 831 (1985); *Chau v. Securities and Exchange Comm'n*, ---F. Supp. 3d---, 2014 WL 6984236 *13 (S.D.N.Y. 2014) ("Congress has provided the SEC with two tracks on which it may litigate certain cases. Which of those paths to choose is a matter of enforcement policy squarely within the SEC's province."). Similarly, at the state level, enforcement procedures and remedies are left to the Department's prosecutorial discretion and is not an appropriate subject for DOAH review. *See, e.g., Sarasota Cnty. v. Dep't of Envtl. Regulation and Falconer*, 9 F.A.L.R. 1822 (Fla. Dep't Envtl. Reg. 1986); *Cobb v. Dep't of Envtl. Regulation,* 1988 WL 618161 *6 (Fla. Dept. of Env. Reg. 1988); *Christensen v. Smith and Dep't of Envtl. Regulation,* 1996 WL 533981 (Fla. Dept. of Env. Reg. 1996).

The RO reflects that the ALJ inappropriately invaded this exclusive province of the Department and concluded that he would have chosen "a less draconian measure than revocation given the evidence of mitigation." (RO ¶ 79). However, section 403.087(7)(b) neither provides for alternatives to revocation, nor provides any standards

for considering mitigation evidence. The state courts are precluded from limiting or expanding a statute by adding words that were not added by the legislature. *See, e.g., Chaffee v. Miami Transfer Co. Inc.,* 288 So. 2d 209, 215 (Fla. 1974) (observing that courts may not invoke a limitation or add words to a statute); *Atlantis at Perdido Ass'n, Inc. v. Warner*, 932 So. 2d 1206, 1212 (Fla. 1st DCA 2006) (reflecting that an appellate court is without power to construe an unambiguous statute in a way that would limit its express terms). Thus, neither DOAH nor the Department may do what the courts cannot do. *Id.; see also GTC, Inc. v. Edgar*, 967 So. 2d 781, 785 (2007) ("An agency's interpretation of the statute that it is charged with enforcing is entitled to great deference.").

Mitigation Evidence

DEP Exception No. 7

DEP takes exception to paragraphs 74 and 75, where the ALJ ultimately concluded that due process requires consideration of evidence in mitigation of the alleged violations. DEP argues that other provisions specifically require the agency to consider mitigating factors. *See, e.g.,* § 403.121(10), Fla. Stat. (2014) ("The administrative law judge [in an ELRA case] may receive evidence in mitigation."). DEP further argues that the legislature knows how to impose such a requirement. Thus, the only relevant evidence should concern whether the violations occurred. *See* DEP's Exceptions at page 6. DEP is correct that "the legislature knows how to impose such a requirement;" and as outlined above the courts and administrative agencies are not authorized to add words that the legislature did not add. *See Chaffee,* 288 So. 2d at 215.

In paragraph 75, the ALJ noted that the Department has allowed mitigating evidence in at least two "permit revocation proceedings." (RO ¶ 75). The first case, *Department of Environmental Protection v. Mahon*, Case No 11-2276 (Fla. DOAH Dec. 30, 2011; Fla. DEP Mar. 20, 2012), was a proceeding to revoke an individual's professional licenses to operate wastewater treatment plants and potable water systems. Sections 403.865 through 403.876, Florida Statutes, authorize the Department to establish qualifications, examine and certify water and wastewater treatment plant operators. Section 403.876, Florida Statutes, authorizes disciplinary action by the Department including suspending, revoking, refusing to issue or renew a license, probation and administrative fines. *See* § 403.876(1), Fla. Stat. (2014).

The rules promulgated under section 403.876 include Florida Administrative Code rule 62-602.870, which expressly provides for consideration of aggravating and mitigating circumstances. *See* Fla. Admin. Code R. 62-602.870(1) ("The Department shall, depending on aggravating and mitigating circumstances, in addition to a fine, suspend a license for a period not to exceed 2 years for any of the following reasons..."). The ALJ in *Mahon* specifically considered "a mitigating circumstance" and recommended an alternative disciplinary action of imposing an administrative fine and probation. *Dep't of Envtl. Prot. v. Mahon*, Case No 11-2276 ¶ 26 (Fla. DOAH Dec. 30, 2011; Fla. DEP Mar. 20, 2012). These remedies are authorized by section 403.876. *See* § 403.876(1), Fla. Stat. (2014). As discussed above, section 403.087 does not authorize alternative remedies or consideration of mitigating circumstances. The interpretation of section 403.087 in this Final Order is more reasonable than that of the ALJ. *See* §

120.57(1)(l), Fla. Stat. (2014) (when rejecting or modifying a conclusion of law, the agency must find its conclusion of law "is as or more reasonable . . ..").

The second case, *Department of Environmental Regulation v. Vail*, Case No. 87-4242 (Fla. DOAH Mar. 11, 1988; Fla. DER May 11, 1988), was an action to revoke a permit for construction of a wastewater treatment facility. The permit holder violated permit conditions by deviating construction of the facility from the engineering plans that accompanied the permit application. A fair reading of the RO in *Vail* suggests that the Department's Administrative Complaint pursued alternative enforcement paths under three provisions that authorized remedies ranging from "appropriate corrective action[s]" to permit revocation. *See Dep't of Envtl. Regulation v. Vail*, Case No. 87-4242 ¶¶ 32-35 (Fla. DOAH Mar. 11, 1988; Fla. DER May 11, 1988). This reading is supported by the ALJ's recommendation that the Department issue a final order requiring Mr. Vail to comply with the corrective orders contained in the Administrative Complaint. *See Id.* at ¶ 45 and page 9. The *Vail* case does not stand for the proposition that section 403.087 contemplates consideration of mitigating circumstances. *See* § 120.57(1)(l), Fla. Stat. (2014).

In paragraph 75, the ALJ also noted that the four revocation cases cited by DEP were either uncontested, or based on a stipulation of facts. (RO ¶ 75). However, in addition to the plain language of section 403.087, these cases are instructive regarding the Department's view of matters properly considered in a permit revocation proceeding. *See, e.g., Dep't of Envtl. Regulation v. City of North Miami*, 1981 WL 180190 (Fla. Dept. of Envtl. Regulation 1981) (final order revoking solid waste permit and dredge and fill permit based on violations of permit conditions; permit holder

violated setback requirements and caused violation of water quality standards); *Dep't of Envtl. Prot. v. Coyote Land Co.,* OGC No. 11-0943, (Fla. DEP August 29, 2011) (revoking permit for C & D facility based on, *inter alia*, violations of permit conditions); *Dep't of Envtl. Regulation v. Moreland*, Final Order, OGC File No. 92-0866 (Fla. DER July 27, 1992) (revoking permit for wastewater treatment plant based on violation of permit conditions); *Dep't of Envtl. Regulation v. Southeastern Fiberboard*, Final Order, OGC File No. 91-0116, (Fla. DER April 3, 1991) (revoking permit for industrial wastewater discharge based on violation of, *inter alia*, permit conditions).

The ALJ ultimately concluded in paragraph 75 that "the concept of due process accords a permit holder the right to present evidence of mitigation" and reaffirmed the ruling on DEP's motion in limine. (RO ¶ 75). The ALJ does not cite any case law to support this conclusion. As DEP argues in this exception, "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the due process clause of the Fifth and Fourteenth Amendment." *Matthews v. Eldridge*, 424 U. S. 319, 332 (1976); *see also Keys Citizens for Responsible Gov't, Inc., v. Fla. Keys Aqueduct Auth.,* 795 So. 2d 940, 949 (Fla. 2001) (applying the *Matthews v. Eldridge* analysis and concluding that due process was provided). The ALJ concluded in paragraph 73 of the RO that South Palafox has no property interest in the subject permit. (RO ¶ 73). Also, the ALJ did not identify any "liberty interest" of South Palafox that is implicated by this revocation proceeding.

For the foregoing reasons, by accepting mitigation evidence the ALJ misinterpreted the requirements of section 403.087. The interpretation of section

403.087 in this Final Order is more reasonable than that of the ALJ. *See* § 120.57(1)(l), Fla. Stat. (2014). Therefore, DEP's Exception No. 7 is granted.

DEP Exception No. 8

DEP takes exception to the first part of paragraph 79 where the ALJ characterized the permit revocation as "especially harsh" or "draconian." *See* DEP's Exceptions at page 9. The context of the characterization was the ALJ's statement that he would have chosen "a less draconian measure than revocation given the evidence of mitigation, ..." (RO ¶ 79). As discussed in the ruling on DEP's Exception No. 7, section 403.087 does not authorize an alternative remedy to revocation or consideration of mitigation evidence. *See* § 403.087(7)(b), Fla. Stat. (2014); *Chaffee v. Miami Transfer Co. Inc.,* 288 So. 2d 209, 215 (Fla. 1974) (observing that courts may not invoke a limitation or add words to a statute).

The ALJ acknowledged in endnote 2 on page 36 that the Department "has a wide range of options in implementing its enforcement process," and "has the discretion to use a notice of revocation under section 403.087(7)." (RO at page 36). As previously discussed, choice of enforcement procedures and remedies are left to the Department's prosecutorial discretion and is not an appropriate subject for DOAH review. *See, e.g., Sarasota Cnty. v. Dep't of Envtl. Regulation and Falconer*, 9 F.A.L.R. 1822 (Fla. Dep't Envtl. Reg. 1986); *Cobb v. Dep't of Envtl. Regulation,* 1988 WL 618161 *6 (Fla. Dept. of Env. Reg. 1988); *Christensen v. Smith and Dep't of Envtl. Regulation,* 1996 WL 533981 (Fla. Dept. of Env. Reg. 1996). Thus, to the extent that the first part of paragraph 79 may reflect an inappropriate review by the ALJ of the Department's exercise of prosecutorial discretion, it is not adopted in this Final Order. *See Id.*

The interpretation of the Department's exercise of prosecutorial discretion under section 403.087 in this Final Order is more reasonable than that of the ALJ. *See* § 120.57(1)(l), Fla. Stat. (2014). Therefore, DEP's Exception No. 8 is granted.

DEP Exception No. 5

DEP takes exception to the ALJ's finding in paragraph 69 that South Palafox's "proposed remediation steps" to reduce the height of the facility "should be taken into account in assessing an appropriate penalty." *See* DEP's Exceptions at pages 3-4; RO ¶ 69. For the reasons discussed in the ruling on DEP's Exception No. 7 above, section 403.087 does not authorize consideration of mitigation evidence. Therefore, DEP's Exception No. 5 is granted.

DEP Exception No. 3

DEP takes exception to the ALJ's finding in the third sentence of paragraph 24. The ALJ found that "[i]n fairness to [South Palafox], a repositioning of the monitoring network and retesting of the samples might have produced more favorable results." (RO ¶ 24). DEP argues that this finding is not supported by the record and is "based on pure speculation." *See* DEP's Exceptions at page 2. Contrary to DEP's argument the ALJ's finding is a reasonable inference from the record testimony of South Palafox's expert referenced in the first two sentences of paragraph 24.[1] (T. Vol. III, pp.319-335). Thus, DEP's exception to the third sentence of paragraph 24 is denied.

DEP also takes exception to the fifth sentence in paragraph 24. The ALJ found that South Palafox's "expert testified that the implementation of its RAP [Remedial

[1] The ALJ can "draw permissible inferences from the evidence." *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985).

Action Plan], now partially implemented, will cure all of the reported exceedances." (RO ¶ 24). DEP argues that the expert's testimony specifies that full RAP implementation may cure the iron exceedances. (T. Vol. III, p. 330 line 7 – p. 331 line 20). A complete review of the record shows that there is no competent substantial record evidence to support a finding that all exceedances will be cured. (T. Vol. III, p. 330 line 7 – p. 331 line 20).[2] Therefore, DEP's exception to the fifth sentence in paragraph 24 is granted.

DEP takes exception to the sixth sentence in paragraph 24. The ALJ found that "[a]ssuming this unrefuted testimony is true, it should be taken into account in determining an appropriate penalty." (RO ¶ 24). DEP argues that the ALJ's assumption is not true. As outlined above the expert's testimony specifies that full RAP implementation may cure the iron exceedances. (T. Vol. III, p. 330 line 7 – p. 331 line 20). However, a complete review of the record shows that there is no competent substantial record evidence to support a finding that all exceedances will be cured. In addition, for the reasons discussed in the ruling on DEP's Exception No. 7 above, section 403.087 does not authorize consideration of mitigation evidence. Therefore, DEP's exception to the sixth sentence in paragraph 24 is granted.

Standard of Proof

DEP Exception No. 6

DEP takes exception to the ALJ's failure to ultimately conclude in paragraphs 71-73 that the standard of proof in this revocation proceeding is the preponderance of the

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[2] In addition, the proposed recommended order submitted to the ALJ by South Palafox does not propose a finding of fact that all exceedances will be cured by RAP implementation. *See* South Palafox proposed order filed February 10, 2015, at ¶ 14, page 5.

evidence standard. *See* DEP Exceptions at pages 4-5. In paragraph 71, the ALJ described that DEP and South Palafox do not agree regarding the standard of proof for the permit revocation proceeding. (RO ¶ 71). The ALJ noted DEP's argument that it must prove the allegations in the Notice of Violation by a preponderance of the evidence, and that South Palafox asserted that the charges should be proven by clear and convincing evidence. (RO ¶¶ 71-73). However, after statutory and case law analysis, the ALJ concluded that "no matter which standard is used, the Department has proven the charges . . . by clear and convincing evidence." (RO ¶¶ 72-73). Nonetheless, DEP argues that the ALJ's express conclusions do not reflect the legally correct standard of proof. *See* RO ¶ 73 (". . . [DEP] has proven the charges set forth below by clear and convincing evidence."); RO ¶ 76 ("By clear and convincing evidence, [DEP] has proven . . . ."). Thus, DEP and permittees lack future guidance regarding the conduct of section 403.087 permit revocation proceedings.[3] *See* DEP Exceptions at pages 4-5.

In paragraph 73, the ALJ states that case law makes a distinction between proceedings in which sanctions involve a professional license and implicates the loss of livelihood, and other licensure disciplinary proceedings. *See, e.g., Dep't of Banking and Fin. v. Osborne Stern and Co.,* 670 So. 2d 932, 933 (Fla. 1996) (observing that when the proceedings implicate the loss of livelihood, an elevated standard is necessary); *see also Haines v. Dep't of Children and Families,* 983 So. 2d 602, 604 (Fla. 5th DCA 2008)

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[3] The Department administers and enforces the provisions of chapter 403, Florida Statutes, and the rules promulgated thereunder, including those applicable to C & D disposal facilities. (RO ¶ 1); *see also* § 120.57(1)(l), Fla. Stat. (2014) (agency can reject or modify a judge's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction").

(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]

The ALJ found that: (1) a C & D permit is not a professional license and does not implicate the loss of livelihood; and (2) section 403.087 specifically provides that the permit issued "does not become a vested interest in the permittee." (RO ¶ 73). Thus, the appropriate standard of proof in this section 403.087 permit revocation proceeding is preponderance of the evidence. *Haines,* 983 So. 2d at 604. The interpretation of section 403.087 in this Final Order is more reasonable than that of the ALJ. *See* § 120.57(1)(l), Fla. Stat. (2014).

Therefore, DEP's Exception No. 6 is granted. The ALJ's conclusions are modified in this Final Order to reflect the legally correct standard of proof as preponderance of the evidence.

Other Exceptions

DEP Exception No. 1

DEP takes exception to the ALJ's finding in the last sentence of paragraph 6 that "[s]ince June, the managing partner of the LLC, Scott Miller, has overseen the operations." (RO ¶ 6). DEP points out that while Mr. Miller has been a managing

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[4] In endnote 4 at page 37, the ALJ contrasts *Haines* with a DEP case where the imposition of an administrative fine is sought in an enforcement action under section 161.054, and the Department must prove the charges by clear and convincing evidence. *See Withers v. Dep't of Envtl. Prot.,* Case No. 02-0621 (Fla. DOAH Jan. 9, 2003; Fla. DEP Feb. 21, 2003). This case is consistent with the Florida Supreme Court's *Osborne Stern* opinion in 1996, which extended the clear and convincing evidence standard to imposition of an administrative fine. *See also Fla. Dep't of Children and Families v. Davis Family Day Care Home,* --- So. 3d ---, 2015 WL 1379920 *2 (Fla. 2015).

member of South Palafox since its inception, there are other managing members, including Charlie Davidson. (T. Vol. III, p. 389 lines 10-12; p. 432 lines 14-20 - p. 433 line 7; p. 441 lines 2-3). To the extent the ALJ's finding suggests that Scott Miller was the sole managing member of South Palafox, the finding is not supported by competent substantial record evidence. Therefore, DEP's Exception No. 1 is granted.

DEP Exception No. 2

DEP takes exception to the ALJ's finding in paragraph 17 that "[t]he monitoring network, already in place when [South Palafox] purchased the facility, consists of six groundwater monitoring wells and three surface water monitoring stations." (RO ¶ 17). DEP argues that the ALJ found that South Palafox acquired the facility in 2007 (RO ¶ 4), and that surface water monitoring requirements were added when the permit was renewed in 2013 (RO ¶ 16; DEP Ex. 1 at pages 18-19). Also, the ALJ found that that the surface water sampling locations were selected by EPT - South Palafox's consultant (RO ¶ 24). (T. Vol. III, p. 354 lines 18-24). Competent substantial record evidence does not support a finding that surface water sampling locations were in place when South Palafox purchased the facility.

Therefore, based on the foregoing reasons, DEP Exception No. 2 is granted.

DEP Exception No. 4

DEP takes exception to the finding in paragraph 53 that an underground sewer pipe "was damaged during the storm, causing it to rupture and be exposed," and that the Escambia County Utilities Authority (ECUA) eventually "repaired the damaged pipe." (RO ¶ 53). DEP argues that the competent substantial record evidence does not support a finding that sewer pipe ruptured. The record evidence supports a finding that

the sewer pipe was exposed as a result of the April 2014 rain event, but not a finding that it was ruptured. (DEP Ex. 23, p. 62; T. Vol. II, p. 244 line 2 – p. 245 line 25; p. 266, lines 3-20; Vol. III, p. 345 line 13 – p. 350 line 11; p. 382 line 22 – p. 383 line 22; p. 422 line 1 – p. 423 line 21; p. 437 line 17 – p. 440 line 2; p. 442 lines 8-14). Thus, DEP's exception to the finding in paragraph 53 that the sewer pipe was ruptured, is granted.

DEP also argues that there is no competent substantial evidence to support the additional finding in the third sentence of paragraph 53 that "[u]ntil the pipe was repaired, [South Palafox's] assumption that it likely contributed to some of the odors detected by the Department appears to be valid." (RO ¶ 53). Contrary to DEP's argument the ALJ's finding is a reasonable inference from the record testimony. The ALJ can "draw permissible inferences from the evidence." *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Therefore, DEP's exception to the third sentence of paragraph 53 is denied.

RULINGS ON SOUTH PALAFOX EXCEPTIONS

Exception No. 1

South Palafox takes exception to the ALJ's finding in paragraph 2 that "Class III fresh surface waters run[] in a northeast-southwest direction through the middle of the [South Palafox] property." (RO ¶ 2).[5] South Palafox argues that "water arrives onsite already exceeding certain DEP constituents of concern." *See* South Palafox Exceptions at page 2. As DEP points out in its response, there is no record basis for this argument. The competent substantial record evidence demonstrates that no samples were taken

[5] All waters of the state, to their landward extent, are considered Class III surface waters unless otherwise identified by rule. *See* Fla. Admin. Code R. 62-302.300(14).

of the water arriving onsite. (T. Vol III, p. 437 lines 10-13; p. 448 line 23 – p. 449 line 18).

In addition, competent substantial record evidence supports the ALJ's finding in paragraph 2. (T. Vol III, p. 392 lines 6-13; p. 334 line 18 – p. 335 line 2; p. 336 lines 4-8; DEP Ex. 3, pp. 2, 45-46; DEP Ex. 23, pp. 50-55; DEP Ex. 30; DEP Ex. 40; R-1, Site Plan). Therefore, South Palafox Exception No. 1 is denied.

Exception No. 2

South Palafox takes exception to the ALJ's findings in paragraph 8 relating to the entry of a Consent Order in 2012 to resolve previous violations. South Palafox makes statements regarding discussions leading up to entry of the Consent Order in 2012. *See* South Palafox Exceptions at page 2. These statements are not supported by the record in this proceeding.

The ALJ's findings in paragraph 8 are supported by competent substantial evidence in the form of the Consent Order and other record testimony. (DEP Ex. 2; T. Vol. I, p. 46 line 18 – p. 47 line 1). Therefore, South Palafox Exception No. 2 is denied.

Exception No. 3

South Palafox takes exception to the ALJ's finding in paragraph 10 relating to community complaints "regarding offensive odors emanating from the facility." South Palafox argues that no competent evidence accurately identified the source of any alleged odors in the Wedgewood Community. *See* South Palafox Exceptions at pages 2-3.

Contrary to South Palafox's argument, the ALJ's finding is supported by competent substantial record evidence in the form of sworn testimony from community

residents. (DEP Ex. 14, pp. 6-7; T. Vol. I, p. 138 line 25 – p. 140 line 7; Vol II, p. 176 line 10 – p. 180 line 3; p. 184 line 20 – p. 185 line 8; p. 189 lines 14-16; p. 203 – p. 205 line 22). Also, there is competent substantial record evidence that the facility was in fact a source of both on-site and off-site odors. (DEP Exs. 14 and 17; T. Vol I, p. 55 line 5 – p. 56 line 19; p. 56 line 20 – p. 57 line 15; p. 104 line 1 – p. 105 line 20; p. 129 lines 4-6; Vol III, p. 341 line 15 – p. 342 line 3; p. 344 lines 7-12; p. 421 lines 2-10; p. 424 line 7 – p. 435 line 25; p. 436 line 3; p. 436 line 25 – p. 437 line 9).

Therefore, South Palafox Exception No. 3 is denied.

Exception No. 4

South Palafox takes exception to the ALJ's finding in paragraph 17 that the surface water quality monitoring network has been in place for a number of years. The ruling in DEP's Exception No.2 above is adopted herein. Thus, the first argument in South Palafox's exception is granted.

The rest of South Palafox's exception contains more argument and no record citations. Therefore, the rest of South Palafox's exception is denied. *See* § 120.57(1)(k), Fla. Stat. (2014) (agency need not rule on an exception that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record").

Exception No. 5

South Palafox takes exception to the ALJ's finding in paragraph 19 that the manner in which the Department determines the existence of a water quality violation is "accepted protocol." (RO ¶ 19). South Palafox argues that the DEP failed to provide

competent and substantial evidence to support the protocol. However, competent substantial record evidence supports the ALJ's finding. (T. Vol. I, p. 42 lines 3-7; Vol III, p. 461 line 11 – p. 462 line 3).

South Palafox also argues that it presented expert testimony that differed from DEP's testimony on this issue, which should be accepted. The ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting the decision. *See Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009). Therefore, South Palafox Exception No. 5 is denied.

Exception No. 6

South Palafox takes exception to the ALJ's finding in paragraph 19 that all of the exceedances shown on Department Exhibits 5 and 6 (except nickel) are violations of water quality standards. (RO ¶ 19). Without providing any record citations, South Palafox argues that competent substantial expert testimony "demonstrated that the water quality data relied upon by the Department was unreliable . . . ." *See* South Palafox Exceptions at page 4.

Contrary to South Palafox's argument, competent substantial record evidence supports the ALJ's finding. (T. Vol. I, p. 37 line 2 – p. 42 line 7; Vol. III, p. 453 line 14 – p. 462 line 3; DEP Exs. 5 and 6). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence

of record supporting the decision. *See Id.* Therefore, South Palafox Exception No. 6 is denied.

Exception No. 7

South Palafox agrees with the ALJ's findings in paragraph 20. Accordingly, this exception is denied.

Exception No. 8

South Palafox takes exception to the ALJ's findings in paragraph 21 relating to turbidity of water samples relied on by the Department to determine violations. South Palafox argues that the ALJ's finding misrepresents the testimony of its expert. *See* South Palafox Exceptions at page 5. There is competent substantial evidence to support the ALJ's findings. (DEP Ex. 5, p. 147; T. Vol. III, p. 324 line 6 – p. 325 line 22). Therefore, South Palafox Exception No. 8 is denied.

Exception No. 9

South Palafox takes exception to the ALJ's finding in paragraph 22 that "[t]here is no rule or procedure that disallows the use of turbid samples. In fact, they can be representative of actual water quality." (RO ¶ 22). South Palafox argues that DEP offered "no competent substantial evidence that turbid samples are representative of actual water quality." *See* South Palafox Exceptions at page 5.

Competent substantial record evidence supports the ALJ's findings. (T. Vol. III, p. 364 line 10 – p. 366 line 16; p. 355 line 23 – p. 357 line 5; DEP Ex. 1). Therefore, South Palafox Exception No. 9 is denied.

Exception No. 10

South Palafox takes exception to the ALJ's finding in paragraph 23 that "[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." (RO ¶ 23). South Palafox argues that the Department "failed to demonstrate and proffered no competent evidence related to the reasonableness of holding water samples 22 days before analysis." *See* South Palafox Exceptions at page 6.

Competent substantial record evidence supports the ALJ's finding. (DEP Ex. 5, p. 77; T. Vol. III, p. 357 line 6 – p. 364 line 4). Also, the ALJ can "draw permissible inferences from the evidence." *See Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Therefore, South Palafox Exception No. 10 is denied.

Exception No. 11

South Palafox takes exception to the ALJ's finding in paragraph 24 that repositioning the monitoring network and retesting the samples in question are procedures that may have been beneficial but "should have been addressed long before this proceeding was initiated." (RO ¶ 24). Competent substantial record evidence supports the ALJ's permissible inferences from the evidence. *See Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). South Palafox proposed the locations for the surface water monitoring which became a condition of the permit. (T. Vol. III, p. 354 lines 18-24). It was made aware of violations of water quality long before DEP commenced this proceeding. (DEP Exs. 5, 6, 7, and 8). South Palafox did not raise any issues with the accuracy of the water quality reports prior to

commencement of this proceeding. (T. Vol. I, p. 97 line 23 – p. 98 line 9; Vol. III, p. 357 line 6 - p. 358 line 22).

Therefore, South Palafox Exception No. 11 is denied.

Exception No. 12

South Palafox agrees with the ALJ's findings in paragraph 24. The ruling in DEP's Exception No. 3 is adopted herein. Accordingly, this exception is denied.

Exception No. 13

South Palafox takes exception to the ALJ's finding in paragraph 28 that "Respondent's failure to implement the approved RAP by the established deadline constitutes a violation." (RO ¶ 28). South Palafox argues that the RAP is in place today and was delayed by third-party interference from Escambia County. *See* South Palafox Exceptions at pages 7-8.

South Palafox did not take exception to the ALJ's factual findings in paragraphs 25 through 27, which form the basis for the ultimate finding of a violation in paragraph 28. Florida case law holds that when a party does not file any exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *See Envtl. Coalition of Fla., Inc. v. Broward Cnty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991). Also, South Palafox did not take exception to the ALJ's finding in paragraph 29 that it "concedes that it did not comply with the deadline for implementing the RAP . . . ." *See Id.*

In addition, South Palafox argues that the RAP was delayed by third-party interference from Escambia County. However, South Palafox did not take exception to the ALJ's findings in paragraphs 29 and 30. These findings establish that South Palafox

did not apply for a required stormwater permit from Escambia County until almost one year after the county's notice of violation. (RO ¶¶ 29 and 30); *see also Envtl. Coalition of Fla., Inc. v. Broward Cnty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991).

Therefore, South Palafox Exception No.13 is denied.

Exception No. 14

South Palafox takes exception to the ALJ's finding in paragraph 31 that the facts suggest that Escambia County processed the stormwater permit application in a timely manner. (RO ¶ 31). Competent substantial record evidence supports the ALJ's finding. (Joint Ex. 1, Deposition of Roza Sestnov at pp. 4, 22-25, 27, 31, 44-47, 63-69; T. Vol. II, p. 262; DEP Ex. 1, p. 4). Therefore, this exception is denied.

Exception Nos. 15 and 16

South Palafox takes exception to the ALJ's finding in paragraph 35 that "other than [South Palafox's] manager indicating that he had a new bonding agent, no evidence was presented to mitigate this violation". The subject violation charged in the Notice of Violation was that South Palafox failed to provide the required inflation adjustment for its closure and long term care bond. South Palafox also takes exception to the ALJ's finding in paragraph 36 that its failure to timely update its financial assurance for closure and long term care costs constitutes a violation. South Palafox argues that it "proffered significant evidence" but fails to provide any record citations. *See* South Palafox Exceptions at pages 8-9.

Competent substantial record evidence supports the ALJ's findings in paragraphs 35 and 36. (T. Vol. III, p. 403 line 3 – p. 404 line 10; p. 413 lines 1-14). The record shows that DEP established the violation. (T. Vol. I, p. 50 line 8 – p. 52 line 4; Stipulated

Fact 10; Vol. I, p. 52 lines 1- 13; Stipulated Fact 11)[6]. Also, South Palafox had the capability to provide the required inflation adjustment at any time. (T. Vol. III, p. 445 lines 1-5). The record further shows that although the inflation adjustment was due on June 16, 2014, Mr. Scott Miller did not begin working on the issue until July 17, 2014. (DEP Ex. 36, Deposition Excerpt of Scott Miller at p. 38 lines 7-12).

Therefore, South Palafox Exception Nos. 15 and 16 are denied.

Exception No. 17

South Palafox takes exception to the ALJ's finding in paragraph 39 by essentially arguing that the corrective action financial assurance should be reduced by the amount already spent implementing the RAP. *See* South Palafox Exceptions at pages 9-10.

In paragraph 39, the ALJ found that Mr. Miller conceded that the requirement for corrective action financial assurance had not been met. (RO ¶ 39). In paragraph 38, the ALJ found that the required corrective action bond, which was due in October 2013, had not been secured by the time of the final hearing in December 2014. (RO ¶ 38). South Palafox did not take exception to the ALJ's findings in paragraph 38. Competent substantial record evidence supports the ALJ's findings in paragraphs 38 and 39. (T. Vol I, p. 53 lines 18-24; Stipulated Facts 12 and 13). Therefore, South Palafox Exception No. 17 is denied.

Exception Nos. 18 and 19

South Palafox takes exception to the ALJ's finding in paragraph 44 that a DEP Engineer became physically ill as a result of odor at the Facility. Also, South Palafox generally objects to any references to onsite odors. *See* South Palafox Exceptions at

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[6] *See* Amended Joint Prehearing Stipulation filed December 5, 2014.

page 10. Competent substantial record evidence supports the ALJ's finding in paragraph 44. (T. Vol. I, p. 56 line 20 – p. 57 line 15). South Palafox's "general objection" is not a legally sufficient exception. *See* § 120.57(1)(k), Fla. Stat. (2014). Therefore, South Palafox Exception Nos. 18 and 19 are denied.

Exception Nos. 20 and 21

South Palafox seeks to clarify paragraph 52, and agrees with paragraph 51. These are not legally sufficient exceptions. *See* § 120.57(1)(k), Fla. Stat. (2014). Therefore, these exceptions are denied.

Exception No. 22

South Palafox takes exception to the ALJ's finding in paragraph 55 that "[o]n July 21 and 22, 2014, samples were taken documenting that hydrogen sulfide was coming from the facility." (RO ¶ 55). South Palafox essentially argues that the hearing testimony does not support this finding. *See* South Palafox Exceptions at page 11. However, there is competent substantial record evidence to support this finding. (T. Vol. I, p. 145 line 1 – p. 146 line 15; p. 146 line 16 – p. 149 line 17; p. 150 lines 3 - p. 151 line 9; p. 163 line 19 – p. 164 line 5; p. 167 lines 9-20). Therefore, South Palafox Exception No. 22 is denied.

Exception No. 23

South Palafox takes exception to the ALJ's finding in paragraph 55 that hydrogen sulfide was present at the Jerome detector during 64% of the days of October and November 2014. South Palafox essentially argues that the hearing record does not support this finding. *See* South Palafox Exceptions at pages 11-12. However, there is competent substantial record evidence to support the ALJ's finding. (T. Vol. I, p. 150

lines 3 - p. 151 line 9; p. 163 line 19 – p. 164 line 5; p. 167 lines 9-20). Also, the ruling in South Palafox Exception No. 3 above is incorporated herein. Therefore, South Palafox Exception No. 23 is denied.

Exception No. 24

South Palafox takes exception to the ALJ's finding in paragraph 56 that "these odors have been emanating from the facility for a number of years." (RO ¶ 56). South Palafox essentially argues that the hearing record does not support this finding. *See* South Palafox Exceptions at page 12. However, there is competent substantial record evidence to support the ALJ's finding. (T. Vol. II, p. 181 lines 9-23; p. 188 lines 10-12). Therefore, South Palafox Exception No. 24 is denied.

Exception No. 25

South Palafox takes exception to the ALJ's finding in paragraph 57 that DEP established that South Palafox's odor remediation plan was not properly implemented, and it did not take steps to immediately control objectionable odors. (RO ¶ 57). South Palafox essentially argues that the hearing record does not support this finding. *See* South Palafox Exceptions at pages 12-13. However, there is competent substantial record evidence to support the ALJ's finding. (T. Vol. I, p. 30 lines 5-8; p. 133 lines 2-5; Vol. II, p. 188 lines 13-17; p. 205 lines 15-22; p. 208 line 22 – p. 209 line 3; p. 206 line 24 – p. 208 line 4). Therefore South Palafox Exception No. 25 is denied.

Exception Nos. 26 and 27

South Palafox takes exception to the ALJ's finding in paragraph 63 "to the extent that it fails to include testimony from [South Palafox] that any and all unauthorized waste present at the site was immediately removed." *See* South Palafox Exceptions at page

13. It is well established that on administrative review of a recommended order the agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994). South Palafox also takes exception to the ALJ's finding in paragraph 64 that it violated a condition of its permit by "failing to remove unauthorized waste." *See* South Palafox Exceptions at page 13.

Contrary to South Palafox's assertion, the ALJ's findings in paragraphs 58 through 62[7] and the record evidence, shows that unauthorized waste was not "immediately removed." (T. Vol. I, p. 58 line 13 – p. 72 line 4; p. 108 line 21 – p. 109 line 5; p. 110 lines 2-21; p. 111 line 2 – p. 112 line 13; Vol. II, p. 265 line 24 – p. 266 line 2; DEP Exs. 14, 20, 22, and 23). Therefore, South Palafox Exception Nos. 26 and 27 are denied.

Exception No. 28

South Palafox takes exception to the ALJ's finding in paragraph 68 that DEP established that South Palafox violated its permit by disposing of waste outside its maximum permitted height of 130 feet NGVD. (RO ¶ 68). South Palafox essentially argues that the hearing record does not support this finding. *See* South Palafox Exceptions at pages 13-14. However, there is competent substantial record evidence to support the ALJ's finding.

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[7] South Palafox did not take exception to these paragraphs in the RO. Florida case law holds that when a party does not file any exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *See Envtl. Coalition of Fla., Inc. v. Broward Cnty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991).

Contrary to South Palafox's argument, the ALJ's findings in paragraphs 65 through 67[8] and the record evidence, show that South Palafox violated permit conditions by not limiting the height of the disposal pile to no more than 130 feet NVGD. (Stipulated Fact 5; DEP Ex. 30; T. Vol. I, p. 72 line 22 – p. 73 line 5; p. 128 lines 8-20; DEP Ex. 18). Therefore, South Palafox Exception No. 28 is denied.

Exception No. 29

South Palafox takes exception to the ALJ's citation to the language of section 403.087(7)(b), Florida Statutes, in paragraph 70. This is not a legally sufficient exception. *See* § 120.57(1)(k), Fla. Stat. (2014). Therefore, this exception is denied.

Exception No. 30

South Palafox takes exception to the ALJ's finding and conclusion in paragraph 71 that "most of the charges in the Notice were admitted by [South Palafox], and much of its evidence was to mitigate those violations." (RO ¶ 71). The ALJ's finding and conclusion in paragraph 71 is supported by the record of this proceeding. (RO ¶¶ 29, 39, 67; Stipulated Facts 5, 10, 11, 12, 13, and 19). Therefore, South Palafox Exception No. 30 is denied.

Exception No. 31

South Palafox takes exception to the ALJ's conclusions in paragraph 73. The ruling on DEP Exception No. 6 above is incorporated herein. Therefore, South Palafox Exception No. 31 is denied.

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[8] South Palafox did not take exception to these paragraphs in the RO. Florida case law holds that when a party does not file any exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *See Envtl. Coalition of Fla., Inc. v. Broward Cnty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991).

Exception No. 32

South Palafox takes exception to the ALJ's ultimate findings in paragraph 76 that the Department proved most of the violations charged in all eight counts of the Notice of Violation. (RO ¶ 76). South Palafox argues that the hearing record does not support the ALJ's findings. *See* South Palafox Exceptions at page 16. However, the ALJ's findings are supported by competent substantial record evidence as outlined in the above rulings on South Palafox's Exceptions. *See, e.g., South* Palafox Exception Nos. 5, 6, 13, 16, 25, 27, and 28). These rulings are incorporated herein. Therefore, South Palafox Exception No. 32 is denied.

Exception No. 33

In this exception South Palafox makes an argument concerning the ALJ's interpretation and application of the rules regarding objectionable odors. South Palafox refers to argument made in its "Motion in Limine and Proposed Order" but does not "clearly identify the disputed portion of the recommended order by page number or paragraph . . . ." *See* § 120.57(1)(k), Fla. Stat. (2014).

South Palafox appears to be making an argument contrary to the ALJ's findings in paragraph 57. The ruling in South Palafox Exception No. 25 above is incorporated herein. Therefore, South Palafox Exception No. 33 is denied.

Exception No. 34

South Palafox takes exception to ALJ's conclusion in paragraph 78 that "the date on which full compliance can be achieved cannot be predicted." (RO ¶ 78). South Palafox argues, contrary to the evidence and the ALJ's findings that "it is in full compliance on the vast majority of counts." *See* South Palafox Exceptions at pages 34-

35. South Palafox outlines alleged actions that may have taken place after the close of this record, to argue that it is now in "full compliance." *See* South Palafox Exceptions at pages 34-35.

It is commonly acknowledged that "review of a recommended order by an agency head is analogous to an appellate proceeding." *See* Fla. Admin. Practice § 4.45 (10th ed. 2015). "The issues are the sufficiency of the evidence to support findings of fact and the correctness of legal conclusions over which the agency has substantive jurisdiction." *Id.; see* § 120.57(1)(l), Fla. Stat. (2014). Therefore, South Palafox's attempt to supplement the hearing record with extra-record information is inappropriate. *See, e.g., Agency for Health Care Admin. v. Orlando Reg'l Healthcare Sys., Inc.,* 617 So. 2d 385, 389 (Fla. 1st DCA 1993) (stating that it is a basic tenet of the appellate process that an appeal is based only on evidence presented to the lower tribunal).

Therefore, South Palafox Exception No. 34 is denied.

Exception Nos. 35 through 38

South Palafox takes exception to the ALJ's conclusion in paragraph 79 that DEP "has established the facts necessary" to revoke the C & D permit. (RO ¶ 79). The ruling in South Palafox Exception No. 32 above is incorporated herein. Thus, the exception to the ALJ's conclusion is denied.

The rest of South Palafox's exceptions to paragraph 79 are denied based on the ruling in DEP Exception No. 8 above, which is incorporated herein.

CONCLUSION

Having considered the applicable law in light of the rulings on the above Exceptions, and being otherwise duly advised, it is ORDERED that:

A. The Recommended Order (Exhibit A), as modified by the above rulings, is adopted in its entirety and incorporated herein by reference.

B. The Respondent South Palafox Properties, Inc.'s, operating permit (Construction and Demolition Debris Disposal Facility Permit No. 003397-013-SO) is hereby REVOKED.

C. The Respondent South Palafox Properties, Inc., shall:

1. within 30 days of the date of this Final Order, submit a permit application for closure and long term care of the Facility in accordance with Florida Administrative Code Rule 62-701.320(1);
2. close the Facility in accordance with Florida Administrative Code Rule 62-701.730(9)(b);
3. complete closure within 180 days of obtaining the permit required in paragraph C.1.;
4. provide certification of closure construction completion no later than 30 days after closing, covering and seeding of the Facility in accordance with Florida Administrative Code Rule 62-701.730(9)(d);
5. conduct long term care for the duration of the long term care permit in accordance with Florida Administrative Code Rule 62-701.730(10).

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order under section 120.68, Florida Statutes, by filing of a Notice of Appeal under rule 9.110 and 9.190, Florida Rules of Appellate Procedure, with the Agency Clerk of the Department in the Office of

General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the Agency Clerk.

DONE AND ORDERED this 29th day of May, 2015, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

JONATHAN P. STEVERSON
Interim Secretary

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

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

Deputy Sandie Kinsey
CLERK

5/29/15
DATE

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Final Order has been sent by electronic mail to:

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and by electronic filing to:

Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

this 29th day of May, 2015.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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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

For Petitioner: B. Jack Chisolm, Jr., Esquire
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For Respondent: V. Nicholas Dancaescu, Esquire
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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

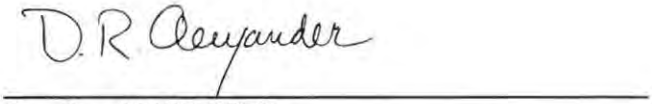
established the facts necessary to take that action. Accordingly, Respondent's Permit should be revoked.

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.