INTEROFFICE MEMORANDUM

Sensitivity: COMPANY CONFIDENTIAL

Date: 07-Nov-2000 11:30am
From: William Leffler TAL
LEFFLER_W
Dept: Air Resources Management
Tel No: 850/488-1344 222-3146 (home)

To: Doug Beason TAL (BEASON_D)
To: Bruce Mitchell TAL (MITCHELL_B)

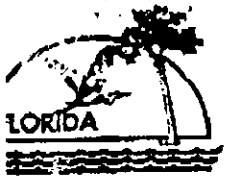
Subject: FWD: - no subject (01JVYIXA67SU000495) -

Doug: Attached is e-mail that I received from Al Ford.

I am upset about the misrepresentations that are made in the amended petition (November 2) regarding when the petitioners had to file. On the day of the first petition, (September 14, to my recollection) I told Al Ford that all of his rights and deadlines were specified in the intent to issue and the public notice, and that I would not be issuing the permit until the comment time passed after receiving the proof of publication. I fail to understand how an educated man could have interpreted this otherwise. The intent and the public notice both explicitly state that the time for response runs from the time of receipt of the intent to issue.

If nothing else this e-mail demonstrates Ford's direct involvement in the case despite having all of the pleadings and letters signed by his associates.

Please let me know how I can be of further service. I will not entertain any telephone conversations or direct correspondence with anyone outside the department on this matter. // Bill



Department of Environmental Protection

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

Jeb Bush
Governor

David B. Struhs
Secretary

FAX COVER SHEET

TO: William Leffler, Bruce Mitchell

TELEPHONE NUMBER: _____

FAX NUMBER: 922-6979

FROM: Doug Beason

FAX NUMBER: (850) 921-3000

DATE OF TRANSMISSION: 11/7/00

NUMBER OF PAGES INCLUDING COVER: 17

If there are problems with this transmission, please contact TAMMY at (850) 921-9682.

COMMENTS:

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

ROBERT H. and ZETTA M. BAKER, and
WILLIAM D. and GEROGIA M. TOWNER,

Petitioner,

vs.

DOAH CASE NO. _____
OGC CASE NO. 00-1797

SAMSULA RECYCLING, INC., and
STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

REQUEST FOR ASSIGNMENT OF ADMINISTRATIVE LAW JUDGE
AND NOTICE OF PRESERVATION OF RECORD

YOU ARE HEREBY NOTIFIED that the Florida Department of Environmental Protection (Department) has received a Petition for Formal Administrative Hearing in the above-styled case. Under section 120.569(2)(a) of the Florida Statutes the Secretary has decided not to act as administrative law judge on the Petition For Administrative Hearing and requests that the Division of Administrative Hearings (DOAH) assign this matter to an administrative law judge to conduct any necessary proceedings required by law and to submit a recommended order to the Department. The Department retains jurisdiction over the Petition to Initiate Rulemaking submitted in the same documents as the Petition for Formal Administrative Hearing. The forwarding of this Petition For Administrative Hearing is not a waiver of the Department's right to object to any material defects in the Petition or to Petitioner's standing to institute this proceeding.

YOU ARE FURTHER NOTIFIED that the Department is responsible for preserving the record of any evidentiary hearings in this case in accordance with section 120.57(1)(g) of the Florida Statutes. Such a record will be preserved by a court reporter or by video tape recording

equipment. The Department will use video tape recording equipment unless one of the parties makes arrangements to provide a court reporter, including payment of the court reporter's fees. Any party arranging for the presence of a court reporter at hearing should notify the administrative law judge and all parties prior to the hearing of the court reporter's name, mailing address, and telephone number.

Whenever a court reporter is used, rule 28-106.214(2) of the Florida Administrative Code provides that the court reporter's recordation becomes the official transcript. The Department may video tape a hearing for its own use even when a court reporter is present. If the Department video tapes a proceeding which is also recorded by a court reporter, copies of the video tapes can be made available to all parties upon request at cost of reproduction. However, parties should not assume in all instances that the Department will video tape a proceeding.

If a party decides to file exceptions to any finding of fact made by the Department, the party will need to submit an official transcript of the proceeding. A transcript may be prepared, at the expense of the requesting party, from a court reporter's notes or, when no court reporter has been hired, from the video tapes made by the Department.

Respectfully submitted this 7th day of NOVEMBER, 2000.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

W. Douglas Beason, Assistant General Counsel
Florida Bar No. 379239
3900 Commonwealth Boulevard, MS #35
Tallahassee, Florida 32399-3000
Telephone (850) 488-9314
Facsimile (850) 921-3000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by * U. S. Mail * facsimile ___ Federal Express this 7th day of November, 2000 to:

J. A. Jurgens, Esq.
Scott Price, Esq.
J.A. JURGENS, PA
505 Wekiva Springs Road, Suite 500
Longwood, FL 32779
Facsimile: 407-722-2278

Christopher W. Wickersham, Sr.
WICKERSHAM & BOWERS
PO Drawer 2250
Daytona Beach, FL 32115-2250
Facsimile: 904-239-5133

Michael Stokes
Samsula Recycling Inc.
363 State Road 415
New Smyrna Beach, FL 32168
Facsimile: 904-423-1436

for Patricia C. Comer
W. DOUGLAS BEASON,
Assistant General Counsel

with a courtesy copy to:

William Leffler, PE
Bruce Mitchell, Eng. IV
DEP – Air Res. Mgt.
Via facsimile only 922-6979

BEFORE THE STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

ROBERT H. and ZETTA M. BAKER, and WILLIAM D. and GEORGIA M. TOWNER,

OGC CASE NO.: 00-1797

Petitioners,

v.

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, and SAMSULA RECYCLING, INC.

Respondents.
_____/

AMENDED COMBINED PETITION FOR FORMAL ADMINISTRATIVE HEARING AND TO INITIATE RULEMAKING

Petitioners, ROBERT H. and ZETTA M. BAKER ("Bakers") and WILLIAM D. and GEORGIA M. TOWNER ("Towners"), hereby file this combined Petition for Formal Administrative Hearing and to Initiate Rulemaking in accordance with § 120.536, 120.54(7)(a), 120.569, 120.57 and 120.573, Florida Statutes ("F.S."), and Rules 62-110.103, 62-110.106(3), 28-103.006 and 28-106.201, Florida Administrative Code ("F.A.C."), and a Public Notice of Intent to Issue Air Construction Permit, Draft Permit #7775112-001-AC, Samsula Recycling, Inc., and as grounds therefore, states as follows:

PARTIES

1. Petitioners, Bakers, are natural persons who own and live at property located at 353 S.R. 415, New Smyrna Beach, Florida 32168, telephone number (904)767-2029. Petitioners are represented by undersigned counsel, whose name, address and

telephone number appear below.

2. Petitioners, Towners, are natural persons who own and live at property located at 355 S.R. 415, New Smyrna Beach, Florida 32168, telephone number (904) 427-2517.

3. Respondent. State of Florida Department of Environmental Protection ("DEP"), is an agency of the State of Florida whose principle office address is 3900 Commonwealth Blvd., Tallahassee, Florida 32399-3000.

4. Respondent, Samsula Recycling, Inc. ("Samsula"), is an operator of a C & D Landfill Facility located at 363 S.R. 415, New Smyrna Beach, Florida 32168. Samsula seeks to permit and operate a concrete, asphalt, and construction debris crusher, which is the subject of this Combined Petition.

5. Petitioners reside immediately adjacent to the subject C & D Landfill and the location of the proposed crusher.

6. On January 17, 2000, Petitioners filed with the Department a Verified Complaint pursuant to §403.412(2)(c), F.S., alleging that subsidiaries of Respondent, Samsula, Yancy's Landclearing, Inc. and Samsula Landfill, Inc., were operating the subject rock crusher without the required DEP permit. Yancy's Landclearing, Inc. and Samsula Landfill, Inc. have the same officers, directors, principals and managers as Respondent, Samsula, those are, Charles Yancey McDonald and Michael Stokes. For purposes of the agency action at issue, Samsula Landfill, Inc., Yancy's Landclearing, Inc. and Respondent, Samsula, are the same corporate entity.

AGENCY ACTION AT ISSUE

7. The agency action at issue is the Notice of Intent to Issue Air Construction Permit,

Draft Permit # 7775112-001-AC and the bases for that Notice, namely, a Technical Evaluation and Preliminary Determination for Draft Air Construction Permit # 7775112-001-AC, signed August 27, 2000 by William Leffler, P.E., DEP ("Technical Evaluation"), and the Draft Permit itself, pages 1-18.

FACTS AND BACKGROUND

8. Prior to the entry of the Consent Order, OGC File No. 00-0210, referred to above, Respondent, Samsula, by and through its officers, managers and related companies, illegally operated the subject rock crusher, without the required DEP Permit much to the detriment of the Petitioners. In said Consent Order, the Department made specific findings of fact that the Respondent's related companies had violated Department statutes and rules by, among other things, operating the subject rock crusher without the required DEP permit.

9. In paragraph 12 of the Consent Order, Respondent Samsula's related companies were directed not to operate the rock crusher without first obtaining the required DEP permit.

10. In less than 60 days of entering into the subject Consent Order, Respondent, Samsula, and/or its associated companies, officers, managers and directors, operated the subject rock crusher in another county without the benefit of the required Department permit. This was a willful and egregious violation of the Consent Order and is a matter of record in the comments submitted to the Department by Petitioners dated July 13, 2000, and the Department's own records. This violation and the myriad other environmental violations by Respondent, Samsula, and/or its related

companies, officers, managers and directors, is documented in the referenced Verified Complaint which is a matter of Department record and thus, will not be reiterated here.

11. During the operation of the subject rock crusher adjacent to the property of Petitioners, Petitioners were subjected to excessive dust and other particulate emissions and extremely excessive high levels of noise pollution and vibrations. These particulate emissions exceeded Department standards and if the subject permit is issued, these particulate emissions and extremely excessive noise pollution will continue.

WHEN AND HOW NOTICE OF AGENCY ACTION RECEIVED

12. In its Order Dismissing Petition with Leave to Amend dated October 23, 2000, the Department alleges that the Petitioners received notice of the Department's actions via U.S. Mail on August 25, 2000. Respondents do not deny that on August 25, 2000, that they did in fact receive, through undersigned counsel, a letter from C.H. Fancy, P.E., of DEP dated August 22, 2000, addressed to Michael Stokes, a copy of an Intent to Issue Air Construction Permit, and a Public Notice of Intent to Issue Air Construction Permit. However, based on the clear language provided in both the August 22, 2000 letter, language of the Intent to Issue, and a conversation with William Leffler, P.E., of the Department, it was made very clear that the Petitioners would not have standing to file a Petition until such time as the "Public Notice of Intent to Issue Air Construction Permit" was published in a newspaper in Volusia County.

13. That publication in Volusia County was a prerequisite for the filing of a Petition by the Petitioners is clear by the plain language provided in the Intent to Issue Air Construction Permit.

14. In Paragraph 4 of the Intent to Issue it states that "the Department has determined that an Air Construction Permit is required in order for the concrete, asphalt, and construction debris crusher facility to relocate to sites throughout the state by publishing a Public Notice in the **counties** designed for construction/installation, performance testing, and potential operation." (Emphasis added). Further, in Paragraph 5, it is stated that "the Notice shall be published one time only in the legal advertisement section of a newspaper of general circulation **in the area affected**." (Emphasis added). Most importantly, the paragraph goes on to state that "no permitting action for which published notice is required shall be granted until proof of publication of notice is made." Thus, the Department's own Intent to Issue makes very clear that there will be no agency action to challenge until publication of the required notice was made in the county for which the permit applicant intends to operate. Without an authorization to operate in their county, Petitioners in no way could satisfy the requirement that their substantial interests were affected by the agency action. Accordingly, Petitioners checked the papers daily until such time as the appropriate notice was published and thereafter timely filed a Petition thereon. The Department's assertion that this Petition was untimely is completely devoid of merit based on the plain language of the subject Intent to Issue.

15. Besides the plain language of the subject Intent to Issue, Petitioners' counsel was told

repeatedly that the Petitioners would have to wait until such time as the Notice of Intent was published in accordance with the subject Intent to Issue before they could petition. This instruction was repeated on more that one occasion by William Leffler, P.E. This direction was based on the fact that the application was for a statewide permit and that Petitioners would not be able to establish that their rights were substantially affected until such time as a notice was published in a newspaper of general circulation in their county.

16. At a minimum, the foregoing facts clearly establish a case for equitable tolling against the Department. Equitable tolling is a well-established legal doctrine in administrative proceedings. See, e.g., Garrepy v. Department of Environmental Protection, DOAH Case No. 98-5090, 1999 Fla. Div. Adm. Hear. LEXIS 209 (Recommended Order, April 9, 1999), citing, Machules v. Department of Administration, 523 So. 2d 1132 (Fla. 1988). The parameters of the "equitable tolling" doctrine are:

> Generally, the tolling doctrine has been applied when the Plaintiff has been mislead or lulled into an action, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum. Machules, 523 So. 2d at 1134.

Certainly, the plain language of the Intent to Issue as quoted above and the clear instruction provided by the Department's representative, Mr. William Leffler, P.E., establish that the Petitioners were "mislead or lulled into inaction."

17. Other facts applicable to this case justify the application of the "equitable tolling" doctrine. At most, according to the alleged facts described by the Department in its Order Dismissing the Petition With Leave to Amend, the delay in the filing of the Petition resulted in only a 6 day delay. It is inconceivable that the applicant will be unduly prejudiced by such a short delay. Furthermore, given the fact that the applicant has continually disregarded the Department's permit requirements and is even, in fact, on this day operating the applied for facility without the benefit of a Department permit, further emphasizes the fact that the applicant is not unduly or unfairly prejudiced by the Department accepting the Petition as filed.

18. Even if any prejudice would result to the applicant due to the minimal six (6) delay caused by accepting the subject Petition, this prejudice must be weighed against the harm that would be visited upon Petitioners if the doctrine is not applied. Department of Transportation v. AK Media Group, Inc., Case No. 99-2863T, Fla. DOAH, 1999 Fla. Div. Adm. Hear. LEXIS 745 (September 2, 1999, Recommended Order) at paragraph 24. The harm to Petitioners will be extreme if the Petition is dismissed and the applicant is granted the permit. Petitioners will again be subjected to the unconfined and uncontrolled emissions and the intolerable noise levels that are a matter of record as contained in the Verified Complaint filed by the Petitioners and as alleged throughout this Petition.

19. Finally, the fourteen (14) day filing requirement contained in the Intent to Issue is not a jurisdictional prerequisite to Petitioners' claim. Rowe v. Sea Ray Boat, Inc. and FDEP, Case No. 00-0218, DOAH, 2000 Fla. Div. Adm. Hear. LEXIS 86 (April 4,

2000, Recommended Order) at paragraph 34, citing, Irwin v. Department of Veteran Affairs, 498 U.S. 89, 92, 11S.Ct.453,455 (U.S. 1990); Milano v. Molds Master, Inc., 703 So. 2d 1093, 1094-1095 (Fla. 4th DCA 1998).

20. Therefore, because the fourteen (14) day filing requirement is not a jurisdictional prerequisite, the six (6) day delay is a minor infraction, the applicant would not be prejudiced, especially in light of the stiff burden that would be imposed upon Petitioners if the doctrine is not applied, and, most importantly, the fact that the Petitioners were mislead or lulled into inaction by the Department, the doctrine of equitable tolling applies in this case and this Amended Petition should be accepted as timely.

ULTIMATE FACTS

21. Rule 62-4.070, F.A.C., requires the Department to issue a permit "only if the applicant affirmatively provides the Department with reasonable assurance . . . that the construction, expansion, modification, operation, activity of the installation will not [violate] Department standards or rules." Petitioners contend that Respondent, Samsula, has failed to provide the necessary reasonable assurances.

DISPUTED ISSUES OF MATERIAL FACTS

22. The repeated history of violation of Department rules and standards by Respondent, Samsula, and its related companies, officers, managers and directors, is so extensive that the applicant has failed to provide the Department with the required reasonable assurances as provided by Rule 62-4.070(5), F.A.C. The provisions in paragraph 15 of page 5 of 18 of the Draft Permit will not overcome this deficiency.

23. The Department has failed to promulgate required rules regarding noise pollution. If the Department had promulgated these required rules, Respondent, Samsula, would not be allowed to operate the subject rock crusher adjacent to Petitioners' residence as it will be allowed if the permit was issued in its current form.

24. The expected air pollutant emissions are not less than 100 TPY of any single criteria air pollutant as identified in the Technical Evaluation.

25. The unconfined fugitive particulate matter emissions from the Facility's operation are not less than 10 TPY of PM as indicated in the Technical Evaluation.

26. The diversion of the oversized stone as described in paragraph 4.1 of the Technical Evaluation will increase the Facility's emissions.

27. Fugitive particulate emission will not be controlled by watering or application of dust suppressant to roadways, work-yard stockpiles despite the description in paragraph 4.2 of the Technical Evaluation. There are other potential emissions at the subject C & D Landfill that were not considered in paragraph 6.1 of the Technical Evaluation. For example, there is currently an unpermitted screening operation at the subject C & D Landfill that is subject to Subpart OOO, 40 CFR Section 60.670. The fact that this screening operation occurs without the required Department permit further emphasizes that the applicant has failed to provide reasonable assurances to the Department for the subject permit. The screening operation along with the total emissions at the site will cause an exceedances of the 100 TPY threshold of Title 5 of the Clean Air Act.

28. The operation of the water-spray suppression system as described in the Facility

description paragraph on page 2 of the Draft Permit along with other dust suppression described therein will cause the unpermitted discharge of industrial wastewater in violation of Rule 62-620.300(2), F.A.C. The visible emissions limits identified on page 6 of the Draft Permit do not conform to the standards required by 40 CFR, Section 60.672.

29. The Draft Permit does not specify how the applicant will comply with the particulate matter limit specified in 40 CFR, Section 60.672(a)(1). Furthermore, the Draft Permit fails to specify how the applicant will demonstrate compliance with this particulate matter standard as required by 40 CFR, Section 60.675(b).

HOW PETITIONERS' INTERESTS ARE AFFECTED

30. Petitioners' substantial interests are affected by the proposed agency action because the proposed permit would subject them to air emissions in violation of Department standards, unnecessary and excessive noise, and unpermitted discharges of industrial wastewater.

RULEMAKING

31. Section 403.061(11), F.S., requires the Department to adopt "standards for the abatement of excessive and unnecessary noise."

32. The fact that the Department has a duty to regulate noise pollution is emphasized by the fact that "noise" is included within the definition of a "pollutant" by Section 403.021(7), F.S.

33. Because the Department has failed to promulgate rules regulating the abatement of excessive and unnecessary noise, Petitioners request that the Department initiate

rulemaking for the purpose of promulgating such rules.

34. The reason that Petitioners request such action of the Department is that without this rule, Petitioners are expected to be subjected to the excessive and unnecessary noise that will be generated by the operation of the rock crusher.

35. Petitioners have a substantial interest in the rule because a rule promulgated by the Department regulating excessive and unnecessary noise would be reasonably expected to alleviate them from being subjected to the excessive and unnecessary noise from the subject rock crusher that they experienced prior to the entry of the referenced Consent Order.

DEMAND FOR RELIEF

Petitioners demand the following relief:

A. Pursuant to Section 120.569(2)(a), F.S., the assignment of an Administrative Law Judge within 15 days of the receipt of this Petition, for a Formal Administrative Hearing at which Petitioner will seek:

1. A Final Order entered by the Department finding that the Respondent, Samsula, has failed to provide the Department the required reasonable assurances; and,

2. A Final Order denying the applied for permit.

B. Pursuant to Section 120.54(7)(b), F.S., the Department initiates rule making

or provide notice in the Florida Administrative Weekly that the Department will hold a public hearing on this Petition within 30 days for purposes of adopting rulemaking regarding the regulation of excessive and unnecessary noise.

Respectfully submitted this 2nd day of November, 2000.

J.A. JURGENS, ESQUIRE
Florida Bar No. 637165
J.A. JURGENS, P.A.
505 Wekiva Springs Road, Suite 500
Longwood, FL 32779
Telephone: 407-772-2277
Facsimile: 407-772-2278

SCOTT PRICE, ESQUIRE
Florida Bar No. 135194
J.A. JURGENS, P.A.
505 Wekiva Springs Road, Suite 500
Longwood, FL 32779
Telephone: 407-772-2277
Facsimile: 407-772-2278

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished via U.S. Mail this 2nd day of November, 2000 to: W. Douglas Beason, Department of Environmental Protection, 3900 Commonwealth Blvd, MS 35, Tallahassee, Florida 32399-3000.

J.A. JURGENS, ESQUIRE
Florida Bar No. 637165
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505 Wekiva Springs Road, Suite 500
Longwood, FL 32779
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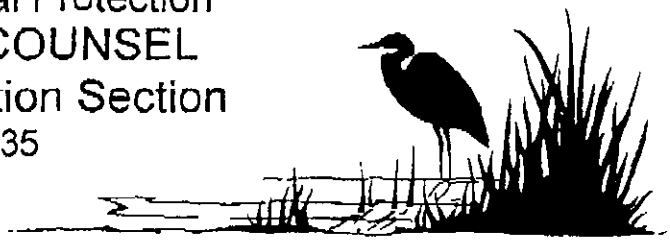
State of Florida
Department of Environmental Protection
OFFICE OF GENERAL COUNSEL
Natural Resources/Litigation Section
3900 Commonwealth Blvd. - MS35
Tallahassee, FL 32399-3000
facsimile: 850-414-1228



FACSIMILE TRANSMITTAL

November 3, 2000

To: BRUCE MITCHELL Fax: 922-6979

From: LISA GLENN

Phone: 850-921-9688

14 pages including cover sheet
Original __ will X will not follow
via __ US Mail __ Federal Express

RE: SAMSULA AMENDED PETITION

Here's a copy of the Amended Petition filed yesterday. Let me know if you need anything else.

BEFORE THE STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

ROBERT H. and ZETTA M. BAKER, and WILLIAM D. and GEORGIA M. TOWNER,

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_____/

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Petitioners, ROBERT H. and ZETTA M. BAKER ("Bakers") and WILLIAM D. and GEORGIA M. TOWNER ("Towners"), hereby file this combined Petition for Formal Administrative Hearing and to Initiate Rulemaking in accordance with § 120.536, 120.54(7)(a), 120.569, 120.57 and 120.573, Florida Statutes ("F.S."), and Rules 62-110.103, 62-110.106(3), 28-103.006 and 28-106.201, Florida Administrative Code ("F.A.C."), and a Public Notice of Intent to Issue Air Construction Permit, Draft Permit #7775112-001-AC, Samsula Recycling, Inc., and as grounds therefore, states as follows:

PARTIES

1. Petitioners, Bakers, are natural persons who own and live at property located at 353 S.R. 415, New Smyrna Beach, Florida 32168, telephone number (904)767-2029. Petitioners are represented by undersigned counsel, whose name, address and

telephone number appear below.

2. Petitioners, Towners, are natural persons who own and live at property located at 355 S.R. 415, New Smyrna Beach, Florida 32168, telephone number (904) 427-2517.

3. Respondent, State of Florida Department of Environmental Protection ("DEP"), is an agency of the State of Florida whose principle office address is 3900 Commonwealth Blvd., Tallahassee, Florida 32399-3000.

4. Respondent, Samsula Recycling, Inc. ("Samsula"), is an operator of a C & D Landfill Facility located at 363 S.R. 415, New Smyrna Beach, Florida 32168. Samsula seeks to permit and operate a concrete, asphalt, and construction debris crusher, which is the subject of this Combined Petition.

5. Petitioners reside immediately adjacent to the subject C & D Landfill and the location of the proposed crusher.

6. On January 17, 2000, Petitioners filed with the Department a Verified Complaint pursuant to §403.412(2)(c), F.S., alleging that subsidiaries of Respondent, Samsula, Yancy's Landclearing, Inc. and Samsula Landfill, Inc., were operating the subject rock crusher without the required DEP permit. Yancy's Landclearing, Inc. and Samsula Landfill, Inc. have the same officers, directors, principals and managers as Respondent, Samsula, those are, Charles Yancey McDonald and Michael Stokes. For purposes of the agency action at issue, Samsula Landfill, Inc., Yancy's Landclearing, Inc. and Respondent, Samsula, are the same corporate entity.

AGENCY ACTION AT ISSUE

7. The agency action at issue is the Notice of Intent to Issue Air Construction Permit,

Draft Permit # 7775112-001-AC and the bases for that Notice, namely, a Technical Evaluation and Preliminary Determination for Draft Air Construction Permit # 7775112-001-AC, signed August 27, 2000 by William Leffler, P.E., DEP ("Technical Evaluation"), and the Draft Permit itself, pages 1-18.

FACTS AND BACKGROUND

8. Prior to the entry of the Consent Order, OGC File No. 00-0210, referred to above, Respondent, Samsula, by and through its officers, managers and related companies, illegally operated the subject rock crusher, without the required DEP Permit much to the detriment of the Petitioners. In said Consent Order, the Department made specific findings of fact that the Respondent's related companies had violated Department statutes and rules by, among other things, operating the subject rock crusher without the required DEP permit.

9. In paragraph 12 of the Consent Order, Respondent Samsula's related companies were directed not to operate the rock crusher without first obtaining the required DEP permit.

10. In less than 60 days of entering into the subject Consent Order, Respondent, Samsula, and/or its associated companies, officers, managers and directors, operated the subject rock crusher in another county without the benefit of the required Department permit. This was a willful and egregious violation of the Consent Order and is a matter of record in the comments submitted to the Department by Petitioners dated July 13, 2000, and the Department's own records. This violation and the myriad other environmental violations by Respondent, Samsula, and/or its related

companies, officers, managers and directors, is documented in the referenced Verified Complaint which is a matter of Department record and thus, will not be reiterated here.

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WHEN AND HOW NOTICE OF AGENCY ACTION RECEIVED

12. In its Order Dismissing Petition with Leave to Amend dated October 23, 2000, the Department alleges that the Petitioners received notice of the Department's actions via U.S. Mail on August 25, 2000. Respondents do not deny that on August 25, 2000, that they did in fact receive, through undersigned counsel, a letter from C.H. Fancy, P.E., of DEP dated August 22, 2000, addressed to Michael Stokes, a copy of an Intent to Issue Air Construction Permit, and a Public Notice of Intent to Issue Air Construction Permit. However, based on the clear language provided in both the August 22, 2000 letter, language of the Intent to Issue, and a conversation with William Leffler, P.E., of the Department, it was made very clear that the Petitioners would not have standing to file a Petition until such time as the "Public Notice of Intent to Issue Air Construction Permit" was published in a newspaper in Volusia County.

13. That publication in Volusia County was a prerequisite for the filing of a Petition by the Petitioners is clear by the plain language provided in the Intent to Issue Air Construction Permit.

14. In Paragraph 4 of the Intent to Issue it states that "the Department has determined that an Air Construction Permit is required in order for the concrete, asphalt, and construction debris crusher facility to relocate to sites throughout the state by publishing a Public Notice in the **counties** designed for construction/installation, performance testing, and potential operation." (Emphasis added). Further, in Paragraph 5, it is stated that "the Notice shall be published one time only in the legal advertisement section of a newspaper of general circulation **in the area affected**." (Emphasis added). Most importantly, the paragraph goes on to state that "no permitting action for which published notice is required shall be granted until proof of publication of notice is made." Thus, the Department's own Intent to Issue makes very clear that there will be no agency action to challenge until publication of the required notice was made in the county for which the permit applicant intends to operate. Without an authorization to operate in their county, Petitioners in no way could satisfy the requirement that their substantial interests were affected by the agency action. Accordingly, Petitioners checked the papers daily until such time as the appropriate notice was published and thereafter timely filed a Petition thereon. The Department's assertion that this Petition was untimely is completely devoid of merit based on the plain language of the subject Intent to Issue.

15. Besides the plain language of the subject Intent to Issue, Petitioners' counsel was told

repeatedly that the Petitioners would have to wait until such time as the Notice of Intent was published in accordance with the subject Intent to Issue before they could petition. This instruction was repeated on more that one occasion by William Leffler, P.E. This direction was based on the fact that the application was for a statewide permit and that Petitioners would not be able to establish that their rights were substantially affected until such time as a notice was published in a newspaper of general circulation in their county.

16. At a minimum, the foregoing facts clearly establish a case for equitable tolling against the Department. Equitable tolling is a well-established legal doctrine in administrative proceedings. See, e.g., Garrepy v. Department of Environmental Protection, DOAH Case No. 98-5090, 1999 Fla. Div. Adm. Hear. LEXIS 209 (Recommended Order, April 9, 1999), citing, Machules v. Department of Administration, 523 So. 2d 1132 (Fla. 1988). The parameters of the "equitable tolling" doctrine are:

> Generally, the tolling doctrine has been applied when the Plaintiff has been mislead or lulled into an action, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum. Machules, 523 So. 2d at 1134.

Certainly, the plain language of the Intent to Issue as quoted above and the clear instruction provided by the Department's representative, Mr. William Leffler, P.E., establish that the Petitioners were "mislead or lulled into inaction."

17. Other facts applicable to this case justify the application of the "equitable tolling" doctrine. At most, according to the alleged facts described by the Department in its Order Dismissing the Petition With Leave to Amend, the delay in the filing of the Petition resulted in only a 6 day delay. It is inconceivable that the applicant will be unduly prejudiced by such a short delay. Furthermore, given the fact that the applicant has continually disregarded the Department's permit requirements and is even, in fact, on this day operating the applied for facility without the benefit of a Department permit, further emphasizes the fact that the applicant is not unduly or unfairly prejudiced by the Department accepting the Petition as filed.

18. Even if any prejudice would result to the applicant due to the minimal six (6) delay caused by accepting the subject Petition, this prejudice must be weighed against the harm that would be visited upon Petitioners if the doctrine is not applied. Department of Transportation v. AK Media Group, Inc., Case No. 99-2863T, Fla. DOAH, 1999 Fla. Div. Adm. Hear. LEXIS 745 (September 2, 1999, Recommended Order) at paragraph 24. The harm to Petitioners will be extreme if the Petition is dismissed and the applicant is granted the permit. Petitioners will again be subjected to the unconfined and uncontrolled emissions and the intolerable noise levels that are a matter of record as contained in the Verified Complaint filed by the Petitioners and as alleged throughout this Petition.

19. Finally, the fourteen (14) day filing requirement contained in the Intent to Issue is not a jurisdictional prerequisite to Petitioners' claim. Rowe v. Sea Ray Boat, Inc. and FDEP, Case No. 00-0218, DOAH, 2000 Fla. Div. Adm. Hear. LEXIS 86 (April 4,

2000, Recommended Order) at paragraph 34, citing, Irwin v. Department of Veteran Affairs, 498 U.S. 89, 92, 11S.Ct.453,455 (U.S. 1990); Milano v. Molds Master, Inc., 703 So. 2d 1093, 1094-1095 (Fla. 4th DCA 1998).

20. Therefore, because the fourteen (14) day filing requirement is not a jurisdictional prerequisite, the six (6) day delay is a minor infraction, the applicant would not be prejudiced, especially in light of the stiff burden that would be imposed upon Petitioners if the doctrine is not applied, and, most importantly, the fact that the Petitioners were mislead or lulled into inaction by the Department, the doctrine of equitable tolling applies in this case and this Amended Petition should be accepted as timely.

ULTIMATE FACTS

21. Rule 62-4.070, F.A.C., requires the Department to issue a permit "only if the applicant affirmatively provides the Department with reasonable assurance . . . that the construction, expansion, modification, operation, activity of the installation will not [violate] Department standards or rules." Petitioners contend that Respondent, Samsula, has failed to provide the necessary reasonable assurances.

DISPUTED ISSUES OF MATERIAL FACTS

22. The repeated history of violation of Department rules and standards by Respondent, Samsula, and its related companies, officers, managers and directors, is so extensive that the applicant has failed to provide the Department with the required reasonable assurances as provided by Rule 62-4.070(5), F.A.C. The provisions in paragraph 15 of page 5 of 18 of the Draft Permit will not overcome this deficiency.

23. The Department has failed to promulgate required rules regarding noise pollution. If the Department had promulgated these required rules, Respondent, Samsula, would not be allowed to operate the subject rock crusher adjacent to Petitioners' residence as it will be allowed if the permit was issued in its current form.

24. The expected air pollutant emissions are not less than 100 TPY of any single criteria air pollutant as identified in the Technical Evaluation.

25. The unconfined fugitive particulate matter emissions from the Facility's operation are not less than 10 TPY of PM as indicated in the Technical Evaluation.

26. The diversion of the oversized stone as described in paragraph 4.1 of the Technical Evaluation will increase the Facility's emissions.

27. Fugitive particulate emission will not be controlled by watering or application of dust suppressant to roadways, work-yard stockpiles despite the description in paragraph 4.2 of the Technical Evaluation. There are other potential emissions at the subject C & D Landfill that were not considered in paragraph 6.1 of the Technical Evaluation. For example, there is currently an unpermitted screening operation at the subject C & D Landfill that is subject to Subpart OOO, 40 CFR Section 60.670. The fact that this screening operation occurs without the required Department permit further emphasizes that the applicant has failed to provide reasonable assurances to the Department for the subject permit. The screening operation along with the total emissions at the site will cause an exceedances of the 100 TPY threshold of Title 5 of the Clean Air Act.

28. The operation of the water-spray suppression system as described in the Facility

description paragraph on page 2 of the Draft Permit along with other dust suppression described therein will cause the unpermitted discharge of industrial wastewater in violation of Rule 62-620.300(2), F.A.C. The visible emissions limits identified on page 6 of the Draft Permit do not conform to the standards required by 40 CFR, Section 60.672.

29. The Draft Permit does not specify how the applicant will comply with the particulate matter limit specified in 40 CFR, Section 60.672(a)(1). Furthermore, the Draft Permit fails to specify how the applicant will demonstrate compliance with this particulate matter standard as required by 40 CFR, Section 60.675(b).

HOW PETITIONERS' INTERESTS ARE AFFECTED

30. Petitioners' substantial interests are affected by the proposed agency action because the proposed permit would subject them to air emissions in violation of Department standards, unnecessary and excessive noise, and unpermitted discharges of industrial wastewater.

RULEMAKING

31. Section 403.061(11), F.S., requires the Department to adopt "standards for the abatement of excessive and unnecessary noise."

32. The fact that the Department has a duty to regulate noise pollution is emphasized by the fact that "noise" is included within the definition of a "pollutant" by Section 403.021(7), F.S.

33. Because the Department has failed to promulgate rules regulating the abatement of excessive and unnecessary noise, Petitioners request that the Department initiate

rulemaking for the purpose of promulgating such rules.

34. The reason that Petitioners request such action of the Department is that without this rule, Petitioners are expected to be subjected to the excessive and unnecessary noise that will be generated by the operation of the rock crusher.

35. Petitioners have a substantial interest in the rule because a rule promulgated by the Department regulating excessive and unnecessary noise would be reasonably expected to alleviate them from being subjected to the excessive and unnecessary noise from the subject rock crusher that they experienced prior to the entry of the referenced Consent Order.

DEMAND FOR RELIEF

Petitioners demand the following relief:

A. Pursuant to Section 120.569(2)(a), F.S., the assignment of an Administrative Law Judge within 15 days of the receipt of this Petition, for a Formal Administrative Hearing at which Petitioner will seek:

1. A Final Order entered by the Department finding that the Respondent, Samsula, has failed to provide the Department the required reasonable assurances; and,

2. A Final Order denying the applied for permit.

B. Pursuant to Section 120.54(7)(b), F.S., the Department initiates rule making

or provide notice in the Florida Administrative Weekly that the Department will hold a public hearing on this Petition within 30 days for purposes of adopting rulemaking regarding the regulation of excessive and unnecessary noise.

Respectfully submitted this 2nd day of November, 2000.

J.A. JURGENS, ESQUIRE
Florida Bar No. 637165
J.A. JURGENS, P.A.
505 Wekiva Springs Road, Suite 500
Longwood, FL 32779
Telephone: 407-772-2277
Facsimile: 407-772-2278

SCOTT PRICE, ESQUIRE
Florida Bar No. 135194
J.A. JURGENS, P.A.
505 Wekiva Springs Road, Suite 500
Longwood, FL 32779
Telephone: 407-772-2277
Facsimile: 407-772-2278

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished via U.S. Mail this 3rd day of November, 2000 to: W. Douglas Beason, Department of Environmental Protection, 3900 Commonwealth Blvd, MS 35, Tallahassee, Florida 32399-3000.

J.A. JURGENS, ESQUIRE
Florida Bar No. 637165
J.A. JURGENS, P.A.
505 Wekiva Springs Road, Suite 500
Longwood, FL 32779
Telephone: 407-772-2277
Facsimile: 407-772-2278