

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

PASCO COUNTY BOARD OF
COUNTY COMMISSIONERS, and
OGDEN MARTIN SYSTEMS OF
PASCO, INC.,

Petitioners,

vs.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondent,

and

Legal Environmental Assistance Foundation,
Inc, ("LEAF"), and Susan M. Elko and
Nathan Elko,

Intervenors,

Final Order

Pursuant to notice, an informal administrative hearing in accordance with
120.57(2), F.S., (Supp 1996) was conducted in the above-styled proceeding
before F. Perry Odom, the assigned Hearing Officer, on July 25, 1997, in
Tallahassee, Florida.

APPEARANCES

For the Petitioners:

Mary F. Smallwood, Esq.
215 South Monroe Street
Tallahassee, Florida 32301

For the Respondent: W. Douglas Beason, Esq.
Assistant General Counsel
2600 Blair Stone Road
Tallahassee, Florida 32301

For the Intervenors: Andrew J. Smith, Esq.
1115 North Gadsden Street
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STATEMENT OF THE ISSUE

The issue is whether the Prevention of Significant Deterioration ("PSD") permit issued to the Pasco County Board of County Commissioners authorizes the County to combust "Additional Solid Waste" as that term is defined in the Amendment to the Service Agreement between the Pasco County Board of County Commissioners and Ogden Martin Systems of Pasco, Inc.,

PRELIMINARY STATEMENT

By letter dated December 30, 1996, the Petitioners requested an interpretation from the Department of Environmental Protection ("DEP") regarding the definition of municipal solid waste ("MSW") as that term is utilized in the PSD permit for the Pasco County Resource Recovery Facility (PSD-FL-127). By letter dated February 6, 1997, the Director of DEP's Division of Air Resources Management notified the Petitioners that DEP did not interpret the term municipal solid waste to include "Additional Solid Waste" as that term is defined in the Amendment to the Service Agreement.

On March 13, 1997, the DEP received a Petition for an Informal Administrative Hearing challenging the DEP's interpretation of the term "municipal solid waste" ("MSW"). On May 29, 1997, DEP entered an Order

Establishing Informal Proceeding which appointed an Informal Hearing Officer and established a prehearing procedure to consider and determine the pertinent issues of law and fact raised in the Petition for an Informal Administrative Proceeding. On June 20, 1997, the Informal Hearing Officer entered an Initial Order, Notice of Hearing and Order of Pretrial Instruction which, among other things, scheduled the informal hearing for July 25, 1997.

On July 7, 1997, the Petitioners filed a Memorandum of Law in Support of Petition for Informal Administrative Hearing which included a Statement of Facts and Petitioners' Exhibits one through nine. The Petitioners also filed a Response to the Initial Order, Notice of Hearing and Order of Pretrial Instruction.

On July 23, 1997, DEP entered an Order Appointing Substitute Informal Hearing Officer which designated F. Perry Odom, General Counsel to DEP, to act as the Informal Hearing Officer for the purpose of conducting the informal proceeding. On July 23, 1997, the Intervenor, Legal Environmental Assistance Foundation ("LEAF"), filed a Petition to Intervene in Informal Administrative Proceeding in support of DEP's position concerning the interpretation of the definition of MSW.

On July 24, 1997, DEP filed a Motion to Terminate Informal Proceedings which requested that the Hearing Officer terminate the informal proceeding based upon the existence of disputed issues of material fact. The DEP alleged, in part, that disputed issues of material fact existed with respect to:(a) whether the PSD permit application proposed the use of Additional Solid Wastes as a

fuel; (b) whether the PSD permit application authorized the use of Additional Solid Wastes as a fuel; and (c) whether the Additional Solid Wastes were municipal solid wastes.

At the commencement of the informal administrative hearing, the Hearing Officer received argument concerning the disposition of DEP's Motion to Terminate Informal Proceeding. The DEP withdrew the motion after the Petitioners agreed both to withdraw Petitioners' Exhibit 4 (the affidavit of a Mr. David Dee) and that Paragraph 8 of the Petitioners' Statement of Facts would be stricken. The parties then agreed that the disposition of the Petition for Informal Administrative Hearing, would be based on the Statement of Facts (excluding Paragraph 8) and Petitioners' Exhibits 1 through 3 and 5 through 11 contained in or attached to the Petitioners' Memorandum of Law in Support of Petition for Informal Administrative Hearing. The parties did not offer any testimony at the final hearing but Petitioner had submitted facts and exhibits previous to the hearing which were received in evidence at the final hearing. The Petition to Intervene filed by LEAF was not opposed by either party, and was therefore granted by the Hearing Officer.

FINDINGS OF FACT

1. Petitioner Pasco County, Board of County Commissioners, (hereafter the "County") owns and operates the Pasco County Resource Recovery Facility (Units 1, 2, and 3) (hereafter the "Facility") located in Pasco County, Florida, under the terms of Department Permit No.: PSD-FL-127 (the

"PSD permit") and the Conditions of Certification issued under the PPSA in Case No. PA 87-23 (the "Conditions of Certification").¹

2. As an incinerator constructed after 1971, but prior to the applicability of 40 CFR 60, Subpart 60, Ea, the Facility is subject to the provisions of 40 CFR Part 60, Subpart E, Standards of Performance of Incinerators. The Facility is also subject to the provisions of Chapters 17-2, 17-7, and 17-30, Florida Administrative Code (1988), the Department's rules in effect at the time the application for a permit and site certification were approved.

3. The Facility is a "resource recovery and management facility" as that term was defined in Section 17-7.020(51), Florida Administrative Code (1988): A resource recovery and management facility was defined as follows:

any solid waste disposal area, volume reduction plant, or other facility the purpose of which is resource recovery or the disposal, recycling, processing, or storage of *solid* waste (Emphasis added). Section 17-7.020(51) F.A.C.

4. The PSD permit issued to the Facility provides, in pertinent part:

SPECIFIC CONDITIONS:

1.e The [Facility] shall be fueled with *municipal solid waste* only. Other wastes shall not be burned without specific prior written approval of [the Department]. (Emphasis added).

5. The Conditions of Certification provide, in pertinent part:

B. The [Facility] shall utilize *refuse* such as *garbage and trash* (as defined in Chapter 17-7, FAC) as its fuel. Use of alternative fuels except for distillate fuel oil or natural gas in start-up burners would necessitate modification of these Conditions of Certification.

¹ A copy of the PSD permit is attached hereto as Exhibit 1 while a copy of the Conditions of Certification is attached hereto as Exhibit 2.

Refuse as fuel shall not include "hazardous waste" as defined in Chapter 17-30, FAC. (Emphasis added). §XIV.B., page 14.

6. The terms "municipal solid waste" and "refuse" were not defined in either the applicable federal or state regulations governing the permitting or operation of the Facility at the time the permits were approved.

7. The PSD permit, General Condition 10., provides:

10. The permittee agrees to comply with changes in Department rules and Florida Statutes after a reasonable time for compliance, provided however, the permittee does not waive any other rights granted by Florida Statutes or Department rules.

8. In its application for PPSA certification and a PSD permit, the County identified the fuel source for the proposed facility as "municipal solid waste," specifically including residential waste, commercial wastes, institutional wastes, and industrial wastes. More specifically, the application stated:

The term "municipal solid waste" applies to all of the solid waste generated within Pasco County, except hazardous and pathogenic wastes and sludges. Since this waste is heterogeneous, characteristics such as heating value, moisture content and ash content will vary. However, Pasco County's solid waste may be classified according to the following general characteristics and sources of generation:

- Residential Wastes. Mixed domestic household wastes (including yard wastes) generated by individuals or families in single or multiple family dwellings.
- Commercial Wastes. Wastes generated by the commercial and retail sector of the county. The physical characteristics of these wastes are similar to residential wastes, consisting primarily of combustible materials in the form of paper and food wastes from offices, restaurants and retail establishments.
- Institutional Wastes. Wastes generated by hospitals, schools, and churches. These wastes have characteristics similar to residential and commercial wastes. Any wastes classified as infectious by federal and state regulations will be excluded.

- Industrial Wastes. Wastes generated by industrial process and manufacturing operations, excluding any wastes classified as hazardous or infectious by federal and state regulations. These wastes also include general housekeeping and support activity wastes associated with industry.

9. In April, 1988, a formal administrative hearing was conducted by a Division of Administrative Hearing ("DOAH") hearing officer to evaluate the County's request for certification under the Power Plant Siting Act...²

10. Testimony at that hearing reflected that the Facility would process residential and commercial non-hazardous waste. No medical waste was to be processed. (T. at 52).

11. Petitioner Ogden Martin Systems of Pasco, Inc., (hereafter "Ogden") operated the Facility on behalf of the County under the terms of a service agreement with the County. On July 6, 1996, the County Commission modified the service agreement to allow Ogden to contract with other public and private entities to accept and process "Additional Solid Waste" (as that term was defined in the amendment to the service agreement) at the Facility.³ The amendment to the service agreement defined "Additional Solid Waste" as

Non-hazardous items suitable for human consumption and/or application whose shelf-life has expired or which the generator wishes to remove from the market and wishes to ensure proper destruction such as off-specification pharmaceuticals (excluding beauty aids).

² The transcript of that hearing is attached to the Petitioner's Memorandum as Exhibit 5. Reference to the Transcript shall be indicated as (T.at).

³ A copy of the Amendment to Service Agreement is attached to the Petitioners' Memorandum of Law as Exhibit 7.

Non-hazardous consumer-packaged products not intended for human consumption and/or applications.

Non-hazardous materials used in the manufacture of items in the categories above that are or contain commercially useless (expired, rejected or spent), or finished products not yet formed or packaged for commercial distribution.

Non-hazardous, non-recyclable plastics, packaging materials, shredded carpet, natural and synthetic fibers, clothing or fabric remnants, containers, (including but not limited to items such as; aprons, gloves, floor sweepings and latex paint).

Non-hazardous materials that contain oil from routine clean-up of industrial establishments and machinery or the oil contaminated materials used in the clean-up of spills of petroleum products in transit or storage, and which are liquid free (including but not limited to items such as: rags, lints, and absorbents) plus oil filters.

Non-hazardous materials generated by manufacturers and industrial activities. This category includes filtercake from the manufacture of synthetic oil, paint overspray, and other filtration materials from industrial processes and systems.

Confidential documents (including but not limited to items such as: records and microfilm).

12. Prior to voting on the proposal to modify the service agreement with Ogden, the County Commissioners considered the report of the Solid Waste Management Citizens Advisory Committee for Pasco County, which unanimously recommended approval of the amendment to the service agreement.

13. Over the course of the Facility's operation, its actual fuel source has included residential, commercial and industrial wastes generated in Pasco County. The facility has also received solid waste from Hillsborough, Citrus and Hernando Counties and Plant City.

14. In addition to the waste streams discussed in paragraph 13 above, the Facility has processed waste resulting from certain emergency management situations. Pasco County, with the knowledge of the Department, utilized the Facility to properly manage the large volume of materials resulting from the "no name" storm of March 1995. In managing this event, the Facility processed in excess of 8000 tons of storm damage related waste materials, including, but not limited to: household furnishings; personal belongings; and water damaged residential, commercial, and industrial wastes. At no time during the processing of waste materials from any such special events did the Facility exceed applicable emission limiting standards or otherwise fail to perform in accordance with permit conditions.

15. Ogden Corporation, through its subsidiary Ogden Waste Treatment Services USA, Inc. (OWTS), has initiated a program at many waste-to-energy facilities around the country to manage "Additional Solid Waste" streams, similar to that approved by the County in the amended service agreement. OWTS's internal procedures for handling these waste streams are described in two documents: (1) Ogden Waste Treatment Services: An Overview, and (2) Material

Characterization Forms and Instructions for Waste Generators. . .⁴ The Overview includes a comprehensive listing of the types of waste streams that are commonly handled as part of the OWTS program. The proposed "Additional Solid Waste" program for the Facility would be operated in a manner consistent with the OWTS program; however, the waste stream would be limited to those materials identified in the amended service agreement with the County.

16. The Facility has operated in compliance with all Department emission limiting standards since its start-up in 1991, except for an exceedance of the mercury standard which occurred in 1996. That exceedance has been corrected in accordance with a Consent Order with the Department in Case No. 97-0273, and no further exceedances of that standard, or any other standard, have occurred.

17. Ogden's Supplemental Waste Program was developed after DEP issued the relevant PSD permit and site certification. The "Ogden Waste Treatment Services: An Overview" provides in part:

HISTORY

Ogden's Supplemental Waste Program. . . was a natural outgrowth of service to our client communities. The program began as a means to provide an environmentally safe and efficient alternative for managing nonhazardous, non-RCRA/non-TSCA-regulated commercial and industrial wastes. *[These waste streams often require special handling to ensure safe and proper disposal. OTWS refers to these waste streams as "supplemental wastes." These are waste streams brought to the waste-to-energy facility in addition - as a supplement -- to the community's waste stream.]* This designation is also indicative of the

⁴ Copies of each of these documents are attached to Petitioner's Memorandum as Composite Exhibit 10.

waste generators' need for confidentiality, assured destruction and environmental destruction. . .⁵ (Emphasis added)

18. The Amendment to the Amended and Restated Service Agreement between the Petitioners provides, in pertinent part:

WHEREAS, in addition to the disposal of municipal solid waste, the Parties wish to have disposed of at the Facility certain wastes designated as Additional Solid Wastes. . .⁶

19. There is no evidence that the permitting proceeding for the County's PSD permit and site certification included a review of OWTS's internal procedures for handling the waste streams as described in (1) Ogden Waste Treatment Services: An Overview, and (2) Material Characterization Forms and Instructions for Waste Generators. Similarly, the DEP's review did not include the Amendment to the Amended and Restated Service Agreement between the Petitioners⁷.

21. On May 16, 1989, the Department promulgated the Solid Waste Grants Program Rule and in section 17-716.200(6), Fla. Admin. Code, the Department defined municipal solid waste as:

any solid waste, except for sludge, resulting from the operation of residential, commercial, governmental, or institutional establishments that would normally be collected, processed, and disposed of through a public or private solid waste management service. The term includes yard trash, but does not include solid waste from industrial, mining, or agricultural operations.

⁵ Petitioners' Composite Exhibit 10, Page 1.

⁶ Petitioners' Exhibit 7.

⁷ Petitioners' Exhibit 7.

This definition is similar to the combined descriptions of "garbage" and "trash" found in Chapter 17-7, Fla. Admin. code.

Additionally, the Department incorporated certain EPA standards, including the definition of municipal solid waste, into its present air pollution program. Section 62-204.800(8)(b), Fla. Admin. code. This definition reads in full:

Municipal solid waste or **municipal-type** solid waste or MSW means household, commercial/retail, and/or institutional waste. Household waste includes material discarded by single and multiple residential dwellings, hotels, motels, and other similar permanent or temporary housing establishments or facilities. Commercial/retail waste includes material discarded by stores, offices, restaurants, warehouses, nonmanufacturing activities at industrial facilities, and other similar establishments or facilities. Institutional waste includes material discarded by schools, nonmedical waste discarded by hospitals, material discarded by nonmanufacturing activities at prisons and government facilities, and material discarded by other similar establishments or facilities. Household, commercial/retail, and institutional waste does not include used oil; sewage sludge; wood pallets; construction, renovation, and demolition wastes (which includes but is not limited to railroad ties and telephone poles); clean wood; industrial process or manufacturing wastes; medical waste; or motor vehicles (including motor vehicle parts or vehicle fluff). Household, commercial/retail, and institutional wastes include:

- (1) Yard waste;
- (2) Refuse-derived fuel; and
- (3) Motor vehicle maintenance materials limited to vehicle batteries and tires except as specified in § 60.50b(g). (Emphasis added).

40 CFR Part 60, Subpart Eb § 60.51b (1996). The EPA adopted an almost identical definition in 1991. 40 CFR Part 60, Subpart Ea, § 60.51a (1991). The definitions in the Department's and the EPA's regulations show where the

Department was headed and verify the intent of the Department's restriction on the fuel stream of the Facility.

CONCLUSIONS OF LAW

1. As to the burden of proof in this proceeding, the Petitioners have the burden of going forward with the evidence as well as the ultimate burden of demonstrating the PSD permit authorizes the combustion of Additional Solid wastes. Young v. Department of Community Affairs, 625 So. 2d at 831, 835 (Fla. 1993).

2. Pasco County's PSD permit application and Power Plant Siting Act certification both identified the fuel source for the proposed facility as "municipal solid waste." Specific Condition 1(e) of the PSD permit provides the County's municipal waste combustors (MWC) shall be fueled with municipal solid waste *only*. The combustion of other wastes requires the prior written approval of DEP. The Conditions of Certification provide the [Facility] shall utilize *refuse* such as *garbage and trash* (as defined in Chapter 17-7, FAC) as its fuel.

3. The PSD permit was issued prior to the effective date of 40 CFR 60, Subpart Ea, which specifically applies to municipal solid waste incinerators. The Petitioners concede the facility is subject to the provisions of 40 CFR Part 60, Subpart E, Standards of Performance of Incinerators.

4. The term "municipal solid waste" was not specifically defined in either the applicable federal or state regulations at the time the PSD permit was issued. However, 40 CFR § 60.40, defined "solid waste" to mean:

refuse, more than 50 percent of which is municipal type waste consisting of a mixture of paper, wood, yard wastes, food wastes, plastics, leather, rubber, and other combustible, and noncombustible materials such as glass and rock.

5. The Subpart E definition of "solid waste" encompasses wastes other than municipal solid waste: however, the definition describes "municipal type wastes" as consisting of a mixture of paper, wood, yard wastes, food wastes, plastics, leather, rubber, and other combustibles. . . ." Given this definition it is reasonable to conclude that municipal solid waste is a type of solid waste. Phrased another way, MSW is a subset of solid waste.

6. The DEP's applicable rules did define the term "solid waste." Rule 17-7.020(58), F.A.C., contained the following definition of Solid Waste:

. . . sludge from a waste treatment works, water supply treatment plant, or air pollution control facility or garbage, rubbish, refuse, or other discarded material. . . resulting from domestic , industrial, commercial, mining, agricultural, or governmental operations.

7. Rule 17-7.020(21), F.A.C., defined "Garbage" to mean:

all kitchen and table food waste, animal or vegetative waste that is attendant with or results from the storage, preparation, cooking or handling of food materials.

8. Rule 17-7.020(65), F.A.C., defined "Trash" to mean:

combinations of yard trash and construction and demolition debris along with other debris such as paper, cardboard, cloth, glass, street sweepings, vehicle tires and other like matter.

9. The Petitioners have failed to meet their burden to provide competent substantial evidence to demonstrate the PSD permit and site certification authorize the combustion of the Additional Solid Waste ("ASW"). The DEP cannot be bound by the provisions and definitions contained in an agreement between Petitioners, an agreement to which DEP was not a party.

10. The Petitioners assert the combustion of the ASW is authorized because the combustion of ASW is not expressly prohibited by the permit. Although the PSD permit does not expressly define the term MSW, this lack of such a definition does not create a presumption that the combustion of ASW is authorized under the PSD permit. This argument attempts to shift the burden of proof to DEP to demonstrate the combustion of waste stream is not authorized under the PSD permit.

Clearly, the burden is on the Petitioners to demonstrate the combustion of the ASW is authorized by the PSD permit. The question is not whether an argument may be crafted today which makes it appear that a particular issue may or may not have been addressed during the permitting process. Rather, the relevant inquiry is whether the issue was addressed during the permitting process.

11. The Petitioners assert there was no regulatory definition of municipal solid waste at the time the "PSD permit or conditions of site certification were issued, and therefore, the other terms specified in the

permit and Conditions of Certification are controlling in determining what fuels are allowed." The Petitioners contend the term municipal solid waste should be construed as being synonymous with the definition of solid waste. The Petitioners contend this conclusion flows from the fact the permit application defined the term municipal solid waste to have the same meaning as the term solid waste.

With regard to the definition of MSW contained in County's PSD permit application, the County asserts that it was "*well aware that the terminology used in the application to describe the fuel stream was not defined in agency regulations.*" The County also alleges that it created its own "*definition to describe the type of materials that would be processed at the facility.*" However, the County concedes the DEP had already adopted a regulatory definition of the term solid waste at the time the County submitted the PSD permit application.

If the County and DEP intended the term municipal solid waste to be construed as being synonymous with the definition of solid waste, then why was it necessary for the County to create its own definition of MSW? If the County and DEP intended the term MSW to have the same meaning as the term solid waste, then there is no basis for County's assertion that "*the terminology used in the application to describe the fuel steam was not defined in agency regulations.*" The County's permit application could have simply cross-referenced the existing definition of solid waste contained in

Rule 17-7.020(58), F.A.C. Instead, the County made the decision to use the term municipal solid waste - a term which was not defined in the applicable regulations. A logical and permissible inference is that the County did not plan on accepting solid waste as defined under the DEP's existing rule. There is no competent substantial evidence to explain why the County did not incorporate the DEP's existing definition.

12. A similar analysis may be applied to the specific condition in the PSD permit which limits fuel to the combustion to MSW. If the term municipal solid waste is to be construed as being synonymous with the definition of solid waste, then one would reasonably expect the PSD permit to incorporate the existing definition of solid waste.

13. Based on the presumption that DEP was aware of the definitions contained within its own rules, then the fact the permit does not incorporate the definition of solid waste is significant. The PSD permit's failure to incorporate the definition of solid waste is evidence of the fact that DEP did not consider the definition of solid waste to be synonymous with the definition of MSW. The issue becomes even murkier when reviewing the conditions of site certification. These conditions provide the [Facility] shall utilize refuse such as garbage and trash (as defined in Chapter 17-7, FAC) as its fuel. Again, there is no evidentiary basis to explain why the site certification fails to incorporate the definition of solid waste.

CONCLUSION

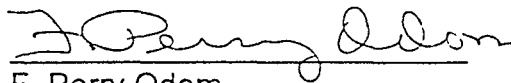
Based upon the foregoing Findings of Fact and Conclusions of Law, the

Department hereby DENIES the Petitioners' request for the entry of a Final Order

holding that the PSD Permit No. PSD-FL-127 and Conditions of Certification in

Case No. PA 87-23 authorized the permittee (County) to burn "Additional Solid

Waste" at the Facility except upon prior written approval of the Department.



F. Perry Odom
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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was mailed on this 10th day of December, 1997, to Mary F. Smallwood, Esq., 215 South Monroe Street, Tallahassee, Fl. 32301, W. Douglas Beason, Assistant General Counsel, 2600 Blair Stone Road, Tallahassee, Fl. 32301, and Andrew J. Smith, Esq, 1115 North Gadsden Street, Tallahassee, Fl. 32303.

