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JUN 09 1997

DIVISION OF AIR RESOURCES MANAGEMENT

STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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

XC: CLAIR  
Mike He  
6/9

Petitioners,

vs.

OGC CASE NO. 97-0507

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION,

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JUN 09 1997

BUREAU OF  
AIR REGULATION

Respondent.

\_\_\_\_\_ /

ORDER ESTABLISHING INFORMAL PROCEEDING

On March 13, 1997, the Department of Environmental Protection (the Department) received a Petition for Informal Administrative Hearing challenging a letter from the Department's Director of the Division of Air Resources Management dated February 6, 1997. See Exhibit 1. This letter was written by the Division Director in response to a request by the Petitioners concerning the interpretation of the term "municipal solid waste" as that term is utilized in the Prevention of Significant Deterioration ("PSD") permit for the Pasco County Resource Recovery Facility (PSD-FL-127).

Under Section 120.57(2), F.S. and Rule 28-5.501 through 28-5.503, F.A.C., I establish the following procedure for an informal proceeding to consider and determine the pertinent issues of law raised by the Petition for Informal Administrative Hearing.

1. I appoint Pat Comer, Assistant General Counsel, as the Hearing Officer in this proceeding. The Hearing Officer's mailing address is Department of Environmental Protection, Office of General Counsel, 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000.

2. An informal hearing will be scheduled by the Hearing Officer after consulting with the parties. The hearing will be conducted at a time and place to be announced. The purpose of the informal hearing is to allow the parties the opportunity to present written and oral evidence concerning the issues raised in the Petition for Informal Administrative Hearing.

3. At the informal hearing, the Hearing Officer may:

- (a) administer oaths and affirmations;
- (b) rule upon offers of proof and receive relevant evidence;
- (c) regulate the course of the hearing;
- (d) enter any order to carry out the purpose of Chapter 120, F.S.; and
- (e) make and receive offers of settlement, stipulation and adjustment.

4. The parties shall arrange to have all witnesses and evidence present at the time and place of hearing. Any party to this proceeding has the right, at his, her or its own expense, to be represented, and advised by counsel. A party's failure to appear at the scheduled hearing may be grounds for the entry of an order of dismissal.

5. The Petitioners shall file and serve on counsel of record a written memorandum of law in support of its position no later than twenty (20) days before the scheduled hearing. The memorandum of law shall contain all argument in support of the Petitioner's position. Failure to file the memorandum of law may be grounds for entry of an order of dismissal.

6. The Department may file written responses to the memorandum of law submitted by the Petitioner no later than ten days after Petitioner's memorandum is filed with the Department.

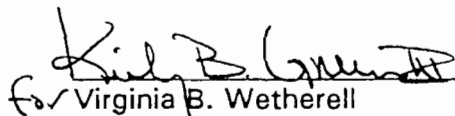
7. A copy of any statement, pleading or other paper filed with the Hearing Officer by any party to this proceeding shall be served on each party. Service shall be made upon the party or his/her representative by delivering a copy or by mailing it to the last known address.

8. The Hearing Officer shall issue a Final Order in compliance with the requirements of Section 120.569, F.S.

9. If during the course of this informal proceeding a party raises an issue which involves a disputed issue of material fact the Department will forward this matter to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct a formal hearing.

DONE and ORDERED this 29<sup>th</sup> day of May, 1997 in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION

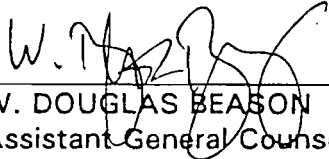
  
for Virginia B. Wetherell  
Secretary

Douglas Building  
3900 Commonwealth Boulevard  
Tallahassee, FL 32399-3000  
Telephone: (904) 488-4805

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was mailed on this 5<sup>th</sup> day of June ~~May~~ 1997, to:

Mary F. Smallwood, Esq.  
P.O. Box 10888  
Tallahassee, Florida 32302

  
\_\_\_\_\_  
W. DOUGLAS BEASON  
Assistant General Counsel  
Florida Bar No. 279239

Mail Station 35  
3900 Commonwealth Boulevard  
Tallahassee, FL 32399-3000  
Telephone: (904) 488-9730

RECEIVED  
MAR 18 1997

BEFORE THE STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

Dept. of Environmental Protection  
Office of General Counsel

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

Petitioners,

v.

Case No. \_\_\_\_\_

DEPARTMENT OF ENVIRONMENTAL  
PROTECTION,

Respondent.

PETITION FOR INFORMAL ADMINISTRATIVE HEARING

~~Pursuant to Section 120.57(2), Florida Statutes, and Rule 62-103.55, Florida Administrative~~

Code, Petitioners, Pasco County, Board of County Commissioners and Ogden Martin Systems of Pasco, Inc. (hereafter the "Petitioners"), file this Petition for Informal Administrative Hearing and state:

1. Petitioners names, addresses and telephone numbers are as follows:

Pasco County, Board of County Commissioners  
7530 Little Road  
New Port Richey, Florida 34654  
(813) 847-8100

Ogden Martin Systems of Pasco, Inc.  
14230 Hays Road  
Spring Hill, Florida 34610  
(813) 856-2917

2. 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 and the Conditions of Certification issued under the Power Plant Siting Act in Case No.: PA 87-23. Petitioner Ogden Martin Systems of Pasco, Inc. (hereafter "Ogden") operates the Facility on behalf of the County under the terms of a service agreement with the County.

3. By letter dated December 30, 1996, to Howard Rhodes, Director, Division of Air Resources Management, Department of Environmental Protection (hereafter "DEP"), a copy of which is attached hereto as Exhibit I, Petitioners requested an interpretation of the permit and conditions of certification that would allow the Facility to burn "supplemental waste" as the term is described in that letter.

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4. On February 24, 1997, Petitioners' counsel received notice by certified mail, return receipt requested, a copy of which is attached hereto as Exhibit II, of DEP's determination construing the language of the permit and certain regulations of the U.S. Environmental Protection Agency to prohibit the burning of supplemental waste at the Facility without a modification of the permit and/or conditions of certification. That correspondence states that "The Subpart E definition of 'solid waste' would . . . be the controlling reference for interpreting the above permit conditions."

5. It is the Petitioners' position that the terms of the permit and conditions of certification presently allow the use of supplemental waste as fuel at the Facility and that there are no statutory or regulatory prohibitions to the burning of supplemental fuel at the Facility, especially in light of the DEP's clarification that the definition in Subpart E controls the interpretation of what waste streams are acceptable. As discussed below, the permit provides that the Facility shall be

fueled by "municipal solid waste" and the conditions of certification provide that the Facility shall be fueled by "refuse."

6. Permit No. PSD-FL-127 provides, in 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 [DEP].

(Emphasis added).

7. The Conditions of Certification in Case No. PA 87-23 provide, in 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. Refuse as fuel shall not include "hazardous waste" as defined in Chapter 17-30, FAC.

(Emphasis added).

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8. 40 CFR Part 60, Subpart E defines "solid waste" as follows:

*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 combustibles, and noncombustible materials such as glass and rock.

(Emphasis added).

9. There are no disputed issues of fact relative to this matter. The relevant facts are those set forth in the permit, conditions of certification, the application to DEP to construct the Facility, Exhibit I, and other materials submitted to DEP at the time of the meeting between Petitioners and DEP on November 25, 1996. Those other materials include: (1) Ogden Waste Treatment Services - An Overview and (2) Material Characterization Forms And Instructions For Waste Generators.

10. The application for construction of the Facility identified the fuel stream as “municipal solid waste,” specifically including residential wastes, commercial wastes, institutional wastes, and industrial wastes. These are the same materials, although described using different terms, as the “municipal type waste” referred to in Subpart E.

11. Applicable Law:

a. The DEP statutes and regulations in effect at the time of issuance of the permit and conditions of certification, including, but not limited to Chapter 403, Florida Statutes, and Chapters 17-4 and 17-7, Florida Administrative Code, govern the construction of the relevant terms used in the permit and conditions of certification. Those statutes and regulations did not define the terms “municipal solid waste” or “refuse.”

b. As stated in the Department’s correspondence dated February 6, 1997, 40 CFR Part 60, Subpart E applies to the Facility. Those provisions do not define the terms “municipal solid waste” or “refuse.”

WHEREFORE, Petitioners respectfully request that the Department:

1. Appoint a hearing officer to take argument in this matter;
2. Enter an order holding that Permit No. PSD-FL-127 and Conditions of Certification Case No. PA 87-23 authorize the permittee to utilize supplemental waste as a fuel at the Facility;
3. Grant such other relief as may be appropriate.



Respectfully submitted, this 13<sup>th</sup> day of March, 1997.

RUDEN, McCLOSKEY, SMITH,  
SCHUSTER & RUSSELL, P.A.

BY: Mary F. Smallwood for  
Mary F. Smallwood (FBN 242616)  
215 South Monroe St., Suite 815  
Tallahassee, FL 32301  
(904) 681-9027  
Attorney for Petitioners  
Pasco County, Board of County  
Commissioners, and Ogden Martin  
Systems of Pasco, Inc.

CERTIFICATE OF SERVICE

The original and one copy of this Petition for Informal Hearing have been filed with the Agency Clerk, Office of General Counsel, Department of Environmental Protection, 3900 Commonwealth Boulevard, Tallahassee, Florida 32399-3000 by hand delivery this 13<sup>th</sup> day of March, 1997.

Mary F. Smallwood for  
MARY F. SMALLWOOD

**BEST AVAILABLE COPY**

RUDEN  
MCCLOSKEY  
SMITH  
SCHUSTER &  
RUSSELL, P.A.  
**ATTORNEYS AT LAW**

215 SOUTH MONROE STREET  
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TALLAHASSEE, FLORIDA 32302

TELEPHONE: (904) 681-9027  
FAX: (904) 224-2032

E-MAIL: MFS@RUDEN.COM

December 30, 1996

VIA HAND DELIVERY

Howard Rhodes, Director  
Division of Air Resources Management  
Department of Environmental Protection  
Suite 24, Magnolia Courtyard  
Tallahassee, FL 32301

Re: Pasco County Resource Recovery Facility

Dear Howard:

As we discussed at our meeting of November 25, 1996, please accept this letter as our request for an interpretation from the Department of Environmental Protection (DEP) of the conditions of the power plant certification and the Prevention of Significant Deterioration (PSD) permit for the Pasco County Resource Recovery Facility (the "Facility") related to the type of fuel that may be burned at the Facility.

Ogden Corporation (Ogden), through its subsidiary Ogden Waste Treatment Services USA, Inc. (OWTS), has long had a "supplemental waste" program at many of the waste to energy facilities around the country. We have previously provided you with copies of the company's internal procedures for handling such wastes and describing the types of materials that would fall within the supplemental waste program in the form of two documents: (1) Ogden Waste Treatment Services: An Overview and (2) Material Characterization Forms and Instructions for Waste Generators. The Overview includes a comprehensive listing of the types of waste streams that are commonly part of the supplemental waste program. We believe these documents, together, should give you a good perspective on the precautions OWTS and the individual facilities take in managing supplemental wastes.

In July, 1996, the Pasco County Commission entered into a service agreement modification with Ogden Martin Systems of Pasco, Inc. (Ogden Martin). This agreement contains the commercial arrangement between the County and Ogden Martin under which the Facility would begin participating in Ogden's supplemental waste program. This agreement more specifically identifies the types of supplemental wastes that the County will allow to be processed at the Pasco Facility.

The Southwest District office of DEP has suggested that Ogden Martin and the County seek an interpretation of the relevant permit conditions. We believe that a review of those provisions will confirm that the existing conditions of the power plant certification and PSD permit for the Facility

have always authorized the County to process supplemental waste at the Facility. The County has not previously chosen to exercise this authority granted to it.

At our November 25 meeting, we referred you to the conditions of the PSD permit (Paragraph 3.3.1) which provided that the Facility would burn "municipal solid waste," defined in the permit as all solid waste except hazardous and pathogenic wastes and sludges. The waste stream was identified in the permit application as (1) residential waste, (2) commercial waste, (3) institutional waste, and (4) industrial waste. There is no definition of "municipal solid waste" in DEP's present regulations or in the regulations that were in effect at the time of permit issuance. However, the permit, itself, in conjunction with the application, clearly defined the type of materials that could be burned at the Facility. As you can see from the OWTS Overview, the materials included in the company's supplemental waste program are the types wastes typically generated by commercial and industrial enterprises.

Since the meeting, we have further reviewed the power plant certification conditions authorizing the construction of a resource recovery facility in Pasco County, in particular, Section XIV.B. related to fuel. The conditions of certification provide that the Facility "shall utilize refuse such as garbage and trash (as defined in Chapter 17-7, FAC) as its fuel. . . . Refuse shall not include 'hazardous waste' as defined in Chapter 17-30, FAC." This construction suggests that the meaning of "refuse" is broader than, not limited to, "garbage" and "trash." In fact, the only type of waste specifically precluded from use is hazardous waste.

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We have reviewed the Department's regulations in effect in 1988 when the power plant certification was issued for this facility. The term "refuse" was not defined in Chapter 17-7 at that time, nor is it in the present regulations. However, refuse is defined by most dictionaries to mean virtually any discarded materials. The terms "garbage" and "trash" were defined in those rules as follows

"Garbage" means 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.

"Trash" means 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. (Emphasis added.)

While garbage and trash are two examples of the type of fuel that may be used, they are clearly not exclusive definitions. It is probably more helpful to consider the two other definitions in the 1988 regulations with respect to the issue of the type of materials to be burned at the facility. In particular, is the definition of "resource recovery and management facility" which is the specific facility for which the certification was issued. That term was defined as:

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.

Howard Rhodes, Director  
December 30, 1996  
Page 3

In turn, "solid waste" was defined to include "garbage, rubbish, refuse, or other discarded material . . . resulting from domestic, industrial, commercial, mining, agricultural, or governmental operations."

It is clear from a review of the full permit and certification conditions that the original approvals for the Facility anticipated the use of a broad range of fuels. In fact, the only materials which the Facility was prohibited from using were hazardous or infectious wastes. As the use of supplemental waste is not prohibited by rule and the materials are within the definitions of "municipal solid waste" and "refuse," we would appreciate your written concurrence that the Facility can accept supplemental waste under the existing regulatory authority. If you have any questions about the proposal that were not addressed in our meeting or this correspondence, please feel free to contact me.

Sincerely,

RUDEN, McCLOSKEY, SMITH,  
SCHUSTER & RUSSELL, P.A.

*Mary F. Smallwood*

Mary F. Smallwood

MFS/db

---

cc: Clair Fancy  
Richard D. Garrity  
Joe Threshler  
Kurt Rieke  
Jason Gorrie  
Gary Thein



# Department of Environmental Protection

Lawton Chiles  
Governor

Twin Towers Office Building  
2600 Blair Stone Road  
Tallahassee, Florida 32399-2400

Virginia B. Wetherell  
Secretary

February 6, 1997

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Ms. Mary F. Smallwood  
Ruden, McClosky, Smith, Schuster & Russell, P.A.  
Attorneys at Law  
P.O. Box 10888  
Tallahassee, Florida 32302

RE: Pasco County Resource Recovery Facility - PSD-FL-127

Dear Ms. Smallwood:

This is in reply to your December 30, 1996 letter requesting an interpretation of the term "municipal solid waste" appearing in Specific Conditions 1.a. and 1.e. of the subject permit.

The permit was issued prior to the effective date of Subpart Ea which applies specifically to municipal waste incinerators rather than the generic "incinerators" regulated under Subpart E. The Subpart E definition of "solid waste" would therefore be the controlling reference for interpreting the above permit conditions. Even though the Subpart E definition of "solid waste" is broader in that it encompasses waste other than municipal type waste, it contains a description of municipal type waste within the solid waste definition as follows: "...municipal type waste consisting of a mixture of paper, wood, yard wastes, food wastes, plastics, leather, rubber, and other combustibles...". Since the permit authorizes municipal solid waste only, it is clear that the intent was to limit the fuel to the categories listed under that internal definition, with other wastes requiring prior written approval. It is our opinion that this interpretation should supersede all other references in the Site Certification conditions as to what constitutes "refuse", "garbage", or "trash".

The Department believes that approving supplemental fuels as "other combustibles" on a case by case basis through permit revisions is still the best approach and is consistent with established BACT procedures. Where necessary, the Subpart Ea restrictions on industrial and other wastes not listed as municipal solid waste may provide guidance in making these case by case determinations.

If there are questions regarding the above, please contact Clair Fancy or John Reynolds at (904)488-1344.

Sincerely,

Howard L. Rhodes, Director  
Division of Air Resources Management

HLR/jr

c: R. Garrity, SWD  
B. Beals, EPA Region IV

*Exhibit II*

"Protect, Conserve and Manage Florida's Environment and Natural Resources"

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,

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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  
Tallahassee, Florida 32303

### 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").<sup>1</sup>

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.

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<sup>1</sup> 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...<sup>2</sup>

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.<sup>3</sup> 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).

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<sup>2</sup> 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 ).

<sup>3</sup> 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. . .<sup>4</sup> 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

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<sup>4</sup> 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. . .<sup>5</sup> (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. . .<sup>6</sup>

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 Petitioners<sup>7</sup>.

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.

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<sup>5</sup> Petitioners' Composite Exhibit 10, Page 1.

<sup>6</sup> Petitioners' Exhibit 7.

<sup>7</sup> 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

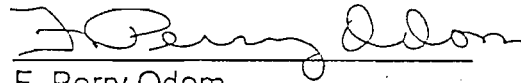
Rule 17-7.020(58), F.A.C. Instead, the County made the decision to use the term municipal solid waste - a term which was not defined in the applicable regulations. A logical and permissible inference is that the County did not plan on accepting solid waste as defined under the DEP's existing rule. There 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.



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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was mailed on this 10<sup>th</sup> 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.

