STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

ARLINGTON RIDGE COMMUNITY ASSOCIATION, INC.,	)	
Petitioner,	)	
v.	)	**OGC CASE NO. 18-0077**
	)	**DOAH CASE NO. 18-5297**
GI SHAVINGS, LLC, and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents.	)	

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on June 19, 2019, submitted a Recommended Order (RO) to the Department of Environmental Protection (DEP or Department) in the above captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. DEP and Arlington Ridge Community Association, Inc. (Arlington Ridge) timely filed exceptions on July 3, 2019. GI Shavings, L.L.C. (GI Shavings) timely filed exceptions on July 5, 2019. DEP timely filed responses to Arlington Ridge's exception on July 15, 2019. Arlington Ridge timely filed responses to DEP's exceptions on July 15, 2019. Arlington Ridge timely filed responses to GI Shavings' exceptions on July 15, 2019.

This matter is now before the Secretary of the Department for final agency action.

BACKGROUND

On April 20, 2018, the Department and GI Shavings entered into the proposed Consent Order (Consent Order) to address certain 2017 violations of GI Shavings' then existing air

construction permit. On January 31, 2018, GI Shavings submitted an application for a revision of its air construction permit under the terms of the proposed Consent Order. On March 1, 2018, the Department issued a notice of intent to issue a minor source air construction permit with the draft 009 Permit attached.

On April 26, 2018, Arlington Ridge filed a petition for administrative hearing (Petition) challenging the draft 009 Permit and the proposed Consent Order. On October 3, 2018, the Department transmitted the Petition to the Division of Administrative Hearings, and the case was assigned DOAH Case No. 18-5297.

In advance of the final hearing, the parties filed an Amended Joint Pre-hearing Stipulation (Stipulation) that included stipulated facts and issues of law on which there was agreement.

At the hearing, Arlington Ridge presented the expert testimony of Mitchell Hait, Ph.D.; and the fact testimony of Robert Salzman, president of Arlington Ridge. Arlington Ridge also presented the fact testimony of Dennis Hartman, James Piersall, Rhonda Lugo, Cheryl Thomack, Sherry O'Brien, Michael Becker, Douglas DeForge, Elise Dennison, and Sabrina Hughes.

Arlington Ridge presented the expert testimony of Shawn Dolan; and the fact testimony of Jeff Rustin, a permit engineer with the Department's Central District Office. Arlington Ridge Exhibits 1 through 9 were admitted into evidence.

On January 22, 2019, Arlington Ridge filed its motion to designate portions of the deposition transcript of Glenn Semanisin, a professional engineer with Grove Scientific and Engineering Company, for admission into evidence. On January 28, 2019, GI Shavings and the Department filed joint objections and cross-designations. The ALJ overruled the joint objections, and the designated and cross-designated portions of Glenn Semanisin's deposition were admitted

into evidence.

GI Shavings presented the expert testimony of Bruno Ferraro, president of Grove Scientific and Engineering Company; the fact testimony of Guiremer Rodriguez, the plant manager for the GI Shavings facility; and, on rebuttal, the fact testimony of Briana Gowan, an environmental specialist with the Department's Central District Office. GI Shavings Exhibits 1, 5, 7, and 8 were admitted into evidence.

The Department presented the expert and fact testimony of Kimberly Rush, permitting program administrator for the Central District Office, who is a professional engineer. Department Exhibit 3 was admitted into evidence without objection. Department Exhibits 1 and 2 were admitted into evidence without objection as joint exhibits.

The four-volume Transcript of the final hearing was filed with DOAH on March 8, 2019. The parties timely submitted their proposed recommended orders on March 28, 2019.

THE RECOMMENDED ORDER

On April 20, 2018, the Department and GI Shavings entered into the proposed Consent Order to address certain 2017 violations of GI Shavings' then existing air construction permit. On January 31, 2018, GI Shavings submitted an application for a revision of its air construction permit under the terms of the proposed Consent Order. On March 1, 2018, the Department issued a notice of intent to issue a minor source air construction permit with the draft 009 Permit attached. Below is a detailed summary of the findings from the ALJ's Recommended Order.

The Parties

The Arlington Ridge community is located in Lake County containing approximately 500 acres. The community is a 55-year-old plus active adult community with approximately 730 homes. The community includes an 18-hole golf course, swimming pool, tennis courts, pickle

ball courts, walking trails, conservation areas, and common areas. (RO ¶ 1).

Arlington Ridge is a Florida not-for-profit community association governed by its Declaration of Restrictive Covenants for Arlington Ridge, recorded on April 15, 2005, at Official Records Book 2809, Page 1622, of the Public Records of Lake County, Florida, as amended. Arlington Ridge's Articles of Incorporation demonstrate that it was formed, in part, to promote the health, safety, and welfare of the owners within its community and to provide for the ownership, operation, maintenance, and preservation of the common areas. (RO ¶ 2).

Arlington Ridge is made up of the Declarant, CB Arlington Ridge Landco, L.L.C., as long as the Declarant still owns lots, and the residents who own lots. Robert Salzman is vice president of the Declarant. He serves as president and is a member of the board of directors of the community association. The Declarant still owns 170 undeveloped lots and 91 lots that are under development. Seven hundred thirty (730) individual residents, who are members of the community association, also own existing homes in Arlington Ridge. The community association owns a section of the roadway and land around the rear gate of the subdivision. (RO ¶ 3).

GI Shavings is a Florida limited liability company and is the applicant for the minor source air construction permit at issue in this proceeding. The GI Shavings property is located adjacent to the Arlington Ridge community. The address is 26444 County Road 33, Okahumpka, Lake County, Florida 34736. GI Shavings also signed the proposed Consent Order at issue in this proceeding. (RO ¶ 4).

The Department is the administrative agency of the state having the power and duty to protect Florida's air and water resources and to administer and enforce the provisions of chapter 403, Florida Statutes, and rules promulgated thereunder in Florida Administrative Code Title 62

regarding activities which have the potential to cause air pollution. (RO ¶ 5).

Facility History of Permitting and Operations

On February 7, 2014, GI Shavings' predecessor, Quality Shavings of South Florida, L.L.C., applied to the Department for an initial air construction permit. The application described the proposed project as a wood chip dryer that included a 30 million British thermal unit per hour (mmBtu/hr) burner fueled by wood chips and sawdust. The burner provided heat to the rotary kiln chip dryer and exhausts to a cyclone dust separator prior to venting to the atmosphere through an exhaust stack. The application materials contained information about the United States Environmental Protection Agency's (USEPA) AP-42 emissions factors for combustion of wood products, with estimations of regulated air pollutant potential and estimated actual emissions from the wood chip drying process. (RO ¶ 6).

The potential emissions for each pollutant and group of pollutants were listed in tons per year (TPY), and based on a 30 mmBtu/hr facility running 8,760 hours per year, i.e., no hourly limit. The estimated actual emissions were based on the facility running a typical production schedule of 3,600 hours per year. (RO ¶ 7).

The listed air pollutants were carbon monoxide (CO), nitrous oxides (NOX), particulate matter (PM), volatile organic compounds (VOCs), sulfur dioxide (SO2), carbon dioxide (CO2), and hazardous air pollutants (HAPs). Although there were potential emissions and estimated actual emissions for each pollutant and group of pollutants, the major source thresholds were not triggered. Therefore, the facility would be classified, from a regulatory standpoint, as a minor source of air pollution. (RO ¶ 8).

The only air pollution control device was the cyclone dust separator that was rated at 99 percent removal efficiency for PM10, i.e., particulate matter of grain size 10 microns or less,

from the exhaust airstream. The application reflected that there were no controls proposed for CO, NOX, VOCs, SO2, CO2, or HAPs. The application was silent as to control of fine particulates or PM2.5, i.e., particulate matter of grain size 2.5 microns or less. (RO ¶ 9).

The application contained a site location map based on an aerial map. The proposed location of the facility was on a parcel adjacent to the Arlington Ridge community's golf course, and further east a road labeled as Arlington Ridge Boulevard. Other roads, in what appeared to be a not fully built-out subdivision, were White Plains Way and Manassas Drive. The facility plot plan in the application located the wood drip dryer, rotary kiln, cyclone dust separator and exhaust stack on the eastern end of the parcel closest to the boundary with the Arlington Ridge community's golf course. (RO ¶ 10).

On April 4, 2014, the Department issued minor source air construction permit 0694866-001-AC (001 Permit). The 001 Permit established a visible emissions (VE) limit of five percent opacity, which is the limit specified under the materials handling rules. Like all air permits issued under the Department's rules, the 001 Permit was also subject to certain general conditions. These included the prohibition against "objectionable odor" as defined in the Department's air pollution rules. (RO ¶ 11).

At the time the 001 Permit was issued, neither GI Shavings nor the Department recognized that the rules for carbonaceous fuel burning equipment were applicable to GI Shavings and that there also should have been a limit for PM in the 001 Permit. Instead, the rules for a materials handling operation were applied to the facility, which required a VE limit of five percent opacity. (RO ¶ 12).

The 001 Permit required GI Shavings to demonstrate initial compliance and apply for an operating permit no later than 60 days before it expired on June 30, 2015. On December 18,

2014, the Department issued an amendment of the 001 Permit to grant a transfer of ownership from Quality Shavings of South Florida, L.L.C., to GI Shavings (002 Permit). (RO ¶ 13).

On May 11, 2015, GI Shavings submitted a request for additional time to demonstrate initial compliance. The reason given for the request was that operations had not started because GI Shavings was waiting on a certificate of occupancy from Lake County, which was expected within the next 60 days. (RO ¶ 14).

On May 28, 2015, DEP granted the request and issued a permit amendment (003 Permit), which extended the expiration date from June 30, 2015, to December 31, 2015. (RO ¶ 15).

On November 24, 2015, GI Shavings submitted a second request for additional time to demonstrate initial compliance. The reason given for the request was coding issues at the new warehouse. The request noted that "[a]ll the equipment has been up and runs." (RO ¶ 16).

On December 7, 2015, the Department granted the request and issued a permit extension (004 Permit), which extended the expiration date from December 30, 2015, to June 30, 2016. (RO ¶ 17).

In the 004 Permit extension, the Department reminded GI Shavings it must notify the Department within five days of commencing operations, start compliance testing within 30 days of commencing operations, notify the Department within 15 days before compliance testing, and apply for an initial air operation permit no later than 60 days before the new expiration date. (RO ¶ 18).

On April 27, 2016, GI Shavings submitted a third request for additional time to demonstrate initial compliance. There was not any reason given for this 120-day extension request. On May 11, 2016, the Department granted the request and extended the permit's expiration date to October 31, 2016 (005 Permit). The Department reiterated the same reminders

as in the 004 Permit extension. (RO ¶ 19).

On October 24, 2016, the Department conducted its first formal site inspection of GI Shavings in response to complaints from Arlington Ridge residents about smoke, airborne particle matter (PM), and odor. The Inspection Report confirmed it was a complaint inspection. The Inspection Report also stated that the Department's permitting engineer, Jeff Rustin, had made a previous site visit at which time he had requested to review facility records. (RO ¶ 20).

The inspection revealed that GI Shavings had commenced operations without notifying the Department and had not scheduled or submitted a VE compliance test to demonstrate compliance with the permit's five percent opacity limit. (RO ¶ 21).

During the site inspection, Jeff Rustin and his supervisor, Tom Lubozynski, both professional engineers, noted that GI Shavings was emitting white smoke from the exhaust stack that did not dissipate quickly and that the smoke may have both moisture and particulates. As they stood 60 feet from the burner and the burner's smoke stack, there was the odor of burning smoke, and particles fell onto Mr. Lubozynski's notepad. (RO ¶ 22).

Based on their observations, the Department's engineers concluded that the cyclone dust separator was not adequately controlling PM emissions, that the method of operations was unlikely to keep emissions below the five percent opacity VE limitation, and that the equipment should not be operated, except for test purposes. (RO ¶ 23).

On October 26, 2016, GI Shavings submitted a fourth request for additional time to demonstrate initial compliance. The company requested an additional 180-day extension with no reason given for the request. On November 23, 2016, the Department granted the request and extended the expiration date from October 31, 2016, to April 4, 2017 (006 Permit). The Department specifically stated in the 006 Permit that the facility was not authorized for normal

operations and suggested the alternatives of adding another pollution control device in the form of a bag house, or replacing the cyclone dust separator. (RO ¶ 24).

Despite the Department's limitations on operations stated in writing at the times of issuing the 004 and 005 Permit extensions, the credible and persuasive evidence was that GI Shavings operated throughout 2016 up until it hired Bruno Ferraro in late November 2016. (RO ¶ 25).

Actions Taken Before Rerating the Burner

Mr. Ferraro is the president of Grove Scientific and Engineering Company, and an expert in air emissions, combustion and visible emissions testing, and air permitting. Mr. Ferraro contacted the Department in early December 2016, stating that he was hired by GI Shavings to evaluate emissions and hoped to visit the facility that month. He requested the original emissions calculations and was provided the original air construction permit application, which contained that information. (RO ¶ 26).

On December 22, 2016, Mr. Ferraro provided the Department with a report of his initial investigation of the GI Shavings facility. He conducted a site visit on December 20, 2016, accompanied by three representatives from the Department that included Jeff Rustin, Brianna Gowan, and Wanda Parker-Garvin. Ms. Parker-Garvin was the environmental manager for the Central District Office's compliance assurance program. Of particular relevance in the report was the following statement:

> The cyclone works as designed by separating the dry wood shavings and sawdust from the hot combustion air. However, the cyclone is not designed to remove fine particulates from the combustion of wood. The particulate matter (PM) emitted from the combustion of wood is unburned carbon and too small a particle size to be removed by the cyclone. This carbonaceous PM is best controlled by increasing the efficiency of combustion or through the use of post combustion control equipment.

Joint Ex. 1 at DEP 1-360 (emphasis added). (RO ¶ 27).

Mr. Ferraro recommended certain actions to increase the efficiency of combustion, such as changing the starter fuel to wood logs and varying the sawdust feed rate. He also recommended that GI Shavings seek (1) a permit modification to allow excess emissions during startup, shutdown, and malfunction, and (2) a permit modification to allow a higher VE limit, such as 20 percent opacity, for normal operating conditions. (RO ¶ 28).

He recommended, as a last resort, the use of post combustion control equipment. This would involve the installation of a bag house, which he described as a "very costly alternative and an excessive measure for controlling carbonaceous PM from the combustion of clean wood." (RO ¶ 29).

The Department responded to Mr. Ferraro's report on January 5, 2017. Ms. Parker-Garvin provided the Department's comments and response in a lengthy email that also approved a two-week experimental testing phase. The email specifically limited opacity to no more than 20 percent for a smoke plume that would be carried by a west wind in an easterly direction toward the adjacent residents and golf course in a 90-degree quadrant designated on an aerial map as the area of concern or "AOC." The email summarized an expectation that a future air operation permit would require a showing of reasonable assurance that the relevant carbonaceous fuel burning rules for a 30 mmBtu/hr burner could be met. This would include a VE limit of 30 percent opacity and a PM limit of 0.2 pounds per mmBtu of heat input of carbonaceous fuel. Both limitations would need to be initially demonstrated before an air operation permit could be issued. (RO ¶ 30).

On January 8, 2017, Mr. Ferraro provided the Department with a draft startup, shutdown, and malfunction operation plan (SSMOP). In his email, Mr. Ferraro stated that the facility would

start the two-week experimental testing phase the next day, on January 9, and keep the Department updated. He also stated that they would submit an application to modify the air construction permit. (RO ¶ 31).

On January 17, 2018,[1] GI Shavings applied for a permit modification, specifying only a change in VE limit from five percent opacity to 30 percent opacity. On March 8, 2017, the Department met with Mr. Ferraro, and an attorney for GI Shavings who attended by telephone. The meeting summary documented a discussion of issues that included requirements for annual PM testing, annual VE testing, and the SSMOP's restrictions on hours of operation and wind direction. The Department's response referred to "health concerns of the complainants," "adverse impacts off property," "numerous complaints," and "proximity to a retirement-age community" as reasons for the SSMOP's restrictions. (RO ¶ 32).

On March 31, 2017, the Department's intent to modify GI Shavings' air construction permit was published. Arlington Ridge residents made verbal comments and filed complaints with the Central District Office regarding the draft air construction permit. The residents also filed a petition for administrative hearing that was eventually resolved, because the evidence showed that the final permit was issued on June 26, 2017. (RO ¶ 33).

On June 26, 2017, the Department modified the air construction permit (007 Permit). The 007 Permit authorized a change in the VE limit, added a PM limit, added a SSMOP, added initial compliance requirements, and extended the expiration to November 30, 2017. The 007 Permit also included a separate hours of operation agreement (HOA) between the Department and GI

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[1] The RO in paragraph 32 inadvertently stated that GI Shavings submitted its application for a permit modification on January 31, 2019, when it was submitted on January 31, 2018. The Department corrected this scrivener's error in the date GI Shavings submitted its application. *See* GI Shavings Exception No. 3, p. 5 and the Department's response below.

Shavings. The HOA initially authorized "[t]wo consecutive 8-hour shifts per day, between the hours of 6:00 am and 10:00 pm, Sunday thru Friday." These hours could be increased based on lack of compliance issues and lack of complaints over a 90-day period after the 007 Permit was issued. (RO ¶ 34).

Mr. Ferraro testified that one of the permit requirements was to do a PM compliance test using EPA Method 5. This involved establishing a protocol that would be approved by the Department prior to conducting the compliance test. He testified that during June and July of 2017, the facility started having operational problems that made it difficult to calibrate the fuel feed system to establish the maximum fuel rate and the maximum shavings production rate. During calibration, the sawdust feed system motor kept burning out. Finally, he was able to schedule and conduct the PM compliance test on August 25, 2017. (RO ¶ 35).

Mr. Ferraro testified that he ran the burner at maximum capacity during the test, which turned out to be an average of 18.252 mmBtu/hr. That is when he observed that this burner's maximum capacity was not 30 mmBtu/hr. The facility failed the PM compliance test with a three-run average PM of 0.531 pounds per mmBtu of heat input of carbonaceous fuel. The facility complied with the VE limit using the EPA Method 9 test, with the highest six-minute average of 13.33 percent opacity. (RO ¶ 36).

The compliance test results were reported to the Department on September 8, 2017. In his report, Mr. Ferraro concluded "[i]t is our opinion that the PM caused by the burning of carbonaceous fuel, plus the process emission from the wood shavings dust combined in the Method 5 sample filter to cause the observed PM emission rate." He stated that GI Shavings wanted to resolve the situation by exploring a change to the PM limit in the permit. (RO ¶ 37).

Mr. Ferraro testified there continued to be startup and operational difficulties at the

facility. At maximum operation, the facility was not able to get the burner to the specified heat output of 30 mmBtu/hr. After multiple calibrations and tests, the facility was still unable to function as originally specified by the manufacturer. (RO ¶ 38).

After consulting with the Department, Mr. Ferraro designed a demonstration test in which the sawdust fuel was fed into the burner without the drying of wood shavings. The demonstration test's purpose was to address the PM and VE from the combustion of sawdust. The test was conducted on October 11, 2017 and reported to the Department on October 30, 2017. The facility failed the PM test with a three-run average PM of 0.824 pounds per mmBtu of heat input of carbonaceous fuel. The facility complied with the VE limit using the EPA Method 9 test, with the highest six-minute average of 5.6 percent opacity. (RO ¶ 39).

Mr. Ferraro concluded that the October test confirmed the PM measured was a result of unburned carbon or incomplete combustion of the carbonaceous fuel, i.e., sawdust. He stated that the cyclone dust separator appears to do a good job of removing all large PM. However, the burner was not designed for complete combustion, i.e., did not burn hot enough for long enough. This resulted in the black soot deposited on the method 5 filters during the compliance tests. (RO ¶ 40).

Meanwhile, on October 10, 2017, Mr. Ferraro forwarded an email to the Department with a request from GI Shavings to increase its hours of operation since it was "commencing our six months busy season," and was negotiating with additional clients. After receiving the initial October 10, 2017, test results from Mr. Ferraro, the Department's permitting program administrator at the time, Kimberly Rush, responded that "[b]ased upon the requirements outlined in the [HOA], the Department cannot approve the request[ed] hours of operation change at this time due to the pending compliance test and the complaint received on 8/16/17." (RO

¶ 41).

Mr. Ferraro testified that GI Shavings decided to bring in Energy Unlimited Inc., the equipment manufacturer, to commission the facility. At this time, GI Shavings, through Mr. Ferraro, also requested an extension of the air construction permit that was set to expire in December of 2017. The reason given was that more time was needed to conduct and complete the commissioning process and continue working on facility compliance. (RO ¶ 42).

On November 20, 2017, the Department extended the expiration date of the air construction permit to November 30, 2018 (008 Permit). The 008 Permit did not make any other changes to the provisions and requirements of the 007 Permit. (RO ¶ 43).

In January 2018, the manufacturer did significant work to the facility's systems, including reworking the fuel feed system, installing a new programmable logic controller and temperature controllers, as well as mechanical and programmatic changes. Upon completion of the commissioning process, Energy Unlimited, Inc., certified and rerated the equipment at a design rate maximum of 26 mmBtu/hr and an actual rate of 21 mmBtu/hr. Mr. Ferraro testified that typical operation was between 15 and 18 mmBtu/hr depending on the temperature outside and the amount of moisture in the air. (RO ¶ 44).

Impacts to Arlington Ridge Residents

Dennis Hartman lives on Arlington Ridge Boulevard and has been a member of the community association since early 2018. Mr. Hartman testified that GI Shavings is located on a diagonal from his home adjacent to the 11th fairway of the golf course. He testified that the smoke and smell from GI Shavings irritates his lungs, throat, and nasal passages. Mr. Hartman testified that he is impacted by the facility, in this manner, at least twice a week. Notably, he does not experience these impacts when he is away from Arlington Ridge. (RO ¶ 45).

James Piersall has been a member of the community association since July 6, 2018, when he closed on his home in Arlington Ridge. Mr. Piersall testified that on November 27, 2018, while playing golf on the 11th hole, a dark blue wave of smoke came across and covered the green. The smell was prevalent, which he equated to burning wood. Mr. Piersall captured the smoke on video with his cell phone. He testified that it was common knowledge that GI Shavings was located on the other side of the 11th hole. The 150-yard marker and a cell tower serve as landmarks that help the residents locate the GI Shavings facility. Mr. Piersall also testified that this was the time of year to open the windows and doors and let the breeze blow through the house. However, it was not possible to do so, as there was "sediment and soot that comes out on the patio." (RO ¶ 46).

Rhonda Lugo has lived in Arlington Ridge since August of 2014 and is a member of the community association. She testified that GI Shavings began operating two years after she moved to Arlington Ridge. She lives on Arlington Ridge Boulevard, where her home is directly behind GI Shavings and her backyard is approximately 300 yards from the facility. Ms. Lugo testified that her first two years in her home were great. She used her lanai and enjoyed her home. She now describes her home as "unlivable." She does not open any doors or windows and has not used the lanai for almost two years. The soot and ash cover her lanai furniture. She testified that her eyes burn, describing the odor as more than "just a wood burning smell." (RO ¶ 47).

Ms. Lugo testified that over the last two years, the residents as a group, have gone to the City of Leesburg and to Lake County, have written senators and state representatives, and have contacted the Department many times. (RO ¶ 48).

Cheryl Thomack has lived on Arlington Ridge Boulevard since August 2017 and has

been a member of the community association. She experiences headaches and breathing difficulties, and uses an inhaler, which she attributes to smoke and soot from the GI Shavings facility. She testified that she went on vacation for a week away from her home and did not experience any headaches or breathing problems while away from Arlington Ridge. She also testified that the GI Shavings facility has operated when the wind is blowing in the direction of the community. (RO ¶ 49).

Michael Becker has lived on Manassas Drive in the Arlington Ridge community since August 4, 2017. Mr. Becker enjoys the outdoor activities at the Arlington Ridge community and is a member of the softball team. He testified that the operations of the GI Shavings facility are disruptive to himself and his wife, and that they stay indoors with all windows and doors closed. He testified that they only enjoy their lanai in the late hours of the night, when GI Shavings is not operating. He described the smoke fumes as "pretty toxic" when the wind is blowing their way, with a scorched wood type ofsmell. (RO ¶ 50).

Mr. Becker testified that he and his wife have taken several videos of dark smoke billowing from the GI Shavings facility and provided them to the community association representatives. Mr. Becker also testified that he was aware of the location of at least two industrial facilities near the Arlington Ridge subdivision. He testified that Covanta, a clean waste facility, was located outside the subdivision's gate, and, what he believed was a cement plant, was located off Rogers Industrial Park Road. (RO ¶ 51).

Douglas Deforge has lived on Manassas Drive since December 2017. He testified that when he first moved in, there was "a lot of noise and I saw a lot of smoke coming out of the trees that are behind us." Eventually, he figured out that it was coming from the location of the GI Shavings facility. Mr. Deforge testified that his wife likes to go out on the lanai to drink her

coffee and read the paper, but she is not able to do so on certain days when the machinery is running. Particles on the lanai must be removed frequently. Mr. Deforge testified that the smoke has a pungent odor like a paper mill. He expressed concern that he may eventually have respiratory issues because of the particles he inhales when out on his lanai. Mr. Deforge testified that since late November 2018, up until the morning of the final hearing, "[i]t seems more frequently that I'm seeing plumes coming out of GI Shavings." (RO ¶ 52).

Sherry O'Brien lives on Arlington Ridge Boulevard and has been a member of the community association since October 2014. The GI Shavings facility is directly behind her home across the 11th fairway of the golf course. She has even walked the fence line at the 11th fairway to locate GI Shavings' smoke stack. Ms. O'Brien testified that the dark smoke and odor from the GI Shavings facility prevents her from enjoying the lanai and golfing. She experiences a more hoarse and raspy voice and sinus problems. Ms. O'Brien testified that even with the windows closed, her home's interior smells like burning wood. She testified that she observed the smoke directly behind the 11th green, which is directly behind her home. In her testimony, Ms. O'Brien distinguished between the location of smoke from the GI Shavings facility and the Covanta facility. (RO ¶ 53).

Robert Salzman has been at Arlington Ridge for several years, four to five days per week, 10 to 12 hours per day. He is involved with the day-to-day activities of the sales office, community association management; and is on the architectural control committee. He testified that GI Shavings' operations impact the 11th and 12th holes of the golf course, which is still owned by the Declarant. Mr. Salzman testified that resident complaints about GI Shavings have increased over the years, particularly in the months of October and November when the operations increase from five to seven days per week and intothe night. He testified that while

GI Shavings is operating, the residents are not active outdoors, they do not seem to leave their homes, and golfers skip the 11th and 12th holes. (RO ¶ 54).

Mr. Salzman testified that he was familiar with the industrial facilities around Arlington Ridge. He testified to the locations of an adjacent peat facility, an aggregate company, and the Covanta waste-to-energy facility. He testified there was not a cement plant nearby, but there was a concrete mixing company. Mr. Salzman also testified that Covanta has a giant stack that puts out steam, but it is not located in the same direction as the GI Shaving facility. (RO ¶ 55).

All the residents who testified stated that they get "black stuff" on their lanais when there is smoke coming from GI Shavings. The residents also testified that they cannot open their windows and cannot enjoy their lanais. All the residents believed that an increase in hours of operation and no restriction on wind direction for GI Shavings would negatively impact their quality of life. (RO ¶ 56).

Complaints to the Department

The preponderance of the competent and substantial evidence showed that the residents lodged complaints with the community association, the Department, and the local governments about GI Shavings' operation for most of 2016, 2017, and 2018. The complaints increased in October of each year when GI Shavings increased operations to meet business demands. The complaints varied from the operations being a nuisance and affecting their quality of life in their retirement community, to genuine concerns for their health and well-being. (RO ¶ 57).

During the hearing, GI Shavings tried to suggest that its facility was not the source of the smoke seen and videoed by the residents. Although the Arlington Ridge subdivision is adjacent to an industrial park, the residents' description and observation of GI Shavings' location behind the tree line at the 11th hole of the golf course was consistent and supported by the

preponderance of the competent and substantial evidence. (RO ¶ 58).

Arlington Ridges' expert witness, Mitchell J. Hait, Ph.D., and GI Shavings' expert witness, Mr. Ferraro, both provided similar descriptions of the atmospheric conditions during the summer and winter months. They explained that during the winter months, when the atmospheric conditions are cooler, the plume from the exhaust stack does not dissipate as quickly as during the warmer summer months. Thus, the plume would tend to remain visible and be carried by the wind. (RO ¶ 59).

The increase in residents' complaints starting in October of each year could be explained by a combination of the cooler atmospheric conditions and GI Shavings' increased operations to meet business demands. GI Shavings tried to suggest that the plumes only consisted of steam from the drying process and that PM was removed at 99 percent efficiency by the cyclone dust separator. However, the ALJ found that the preponderance of the competent and substantial evidence established that the cyclone dust separator did not remove fine PM identified as "unburned carbon . . . too small a particle size to be removed by the cyclone." In other words, the "black stuff" that the residents found on their lanais, and the odor that irritated their noses, throats, and lungs. (RO ¶ 60).

Enforcement and Consent Order

Despite lay and expert evidence of ongoing objectionable odor violations, the Department sought only to resolve the August and October 2017 PM emission limit exceedances with the proposed Consent Order. (RO ¶ 61). The Consent Order did not address odor violations. (RO ¶ 64).

The proposed Consent Order gave GI Shavings a choice of corrective actions to resolve the PM violations and did not impose any monetary penalty. The choice given was to either

install a pollution control device, such as a bag house and thereby comply with the PM limit, or perform a rerating of the burner and thereby no longer be subject to the PM limit. (RO ¶ 62).

The proposed Consent Order was executed on April 20, 2018, at which time GI Shavings had already rerated the facility, applied for a permit, and received a notice of intent to issue with the draft 009 Permit. These completed actions were stated in the proposed Consent Order. The Department's expert witness, Ms. Rush, testified that considering the difficulties with the facility's operations at its original specifications, rerating the burner was a viable option for obtaining compliance. (RO ¶ 63-64).

Because the ALJ found that the preponderance of the competent and substantial evidence established that the cyclone dust separator did not remove the fine PM that was the source of the residents' objectionable odor complaints, the ALJ found that the adequate and reasonable course of action would be to order GI Shavings to install both a bag house and perform the rerating of the burner. (RO ¶ 62).

Permit Application 009

On January 31, 2018, Mr. Ferraro, on behalf of GI Shavings, submitted the 009 Permit application to the Department. Mr. Ferraro testified that the purpose of the application was to apply the correct part of the carbonaceous fuel burning equipment rule to the facility. The switch would be from the standards applicable to a 30 mmBtu/hr burner to the standards applicable to a less than 30 mmBtu/hr burner. This switch would remove the PM limit and change the VE limit to 20 percent opacity. (RO ¶ 65).

Mr. Ferraro testified that the application did not request any other change, and the Department did not request any additional information. The application described its purpose as "to update [the] emission limiting standard for carbonaceous [fuel] burning equipment with a

rating of less than 30mmBtu/hr." (RO ¶ 66).

The emissions unit control equipment was described as a single cyclone device that "separates wood shavings and sawdust from airstream but does not control products of combustion." Although the inability of the cyclone dust separator to "control products of combustion" was acknowledged, the application indicated that PM would not be synthetically limited, and that a PM limit would not apply to the facility. (RO ¶ 67).

The application did not propose a pollutant control device for the continuously acknowledged unburned carbon described as "too small a particle size to be removed by the cyclone." Ms. Rush testified that the only PM expected from the facility was PM10. However, as Mr. Ferraro pointed out in his testimony, actual site-specific information and data should be considered whenever it is available, instead of simply relying on what is expected based on the literature from the USEPA. (RO ¶ 68).

The 009 Permit's notice of intent to issue also stated that "the operational hours agreement has been removed from the permit," although GI Shavings did not apply for any change to the 008 Permit beyond the rule switch. Ms. Rush testified that the operational house agreement (HOA) was voluntary and the Department did not have the authority to require GI Shavings to incorporate these terms into future permits. However, the HOA continues to be a condition of GI Shavings' current 008 Permit. The Department and GI Shavings did not present any persuasive evidence to show that this condition was now obsolete and should not be carried forward into the 009 Permit. (RO ¶ 69).

The 009 Application did not request any revision to the current SSMOP. Ms. Rush testified that any minor source air permittee may request to revise its SSMOP at any time. However, such a request would be subject to Department approval as specified in condition

A.15. of the draft 009 Permit. (RO ¶ 70).

Although Dr. Hait testified that the facility should be reviewed as a 30 mmBtu/hr burner, the more persuasive evidence was that the rerating by the manufacturer established a design fire rating of 26 mmBtu/hr and an actual rating of 21 mmBtu/hr. Ms. Rush testified that the draft 009 Permit would contain a feed rate limitation that would restrict the facility to a maximum firing rate of 21 mmBtu/hr. Thus, the carbonaceous fuel equipment burning rule was the most appropriate category for this facility, and it was appropriately regulated as a minor source of air pollution. (RO ¶ 71).

The preponderance of the competent and substantial evidence proved that GI Shavings did not provide reasonable assurance that the facility would control the cause of the objectionable odor violations, i.e., fine PM identified as "unburned carbon . . . too small a particle size to be removed by the cyclone." In other words, the "black stuff" that the residents had constantly and consistently complained about. (RO ¶ 72).

Ultimate Findings

The ALJ found that the preponderance of the competent and substantial evidence established that the GI Shavings facility emits fine PM or "black soot" into the outdoor atmosphere, which by itself or in combination with other odors, unreasonably interferes with the comfortable use and enjoyment of life or property at the Arlington Ridge community, and which creates a nuisance. (RO ¶ 73).

The ALJ also found that the preponderance of the competent and substantial evidence established that the cyclone dust separator did not remove the fine PM that was the source of the residents' objectionable odor complaints. Therefore, it was an unreasonable exercise of enforcement discretion for the Department to not require GI Shavings to directly address the

objectionable odor issue. (RO ¶ 74).

In addition, the ALJ found that the utility of entering the proposed Consent Order was diminished by the fact that the October 2017 alleged violation was not an appropriate compliance test. Also, by the fact that the proposed Consent Order was not finally executed until April 20, 2018, at which time GI Shavings had already rerated the facility, applied for a permit, and received a notice of intent to issue with the draft 009 Permit. (RO ¶ 75).

The ALJ found that the preponderance of the competent and substantial evidence proved that GI Shavings did not provide reasonable assurance that the facility would control fine PM, which the evidence established was the source of the residents' objectionable odor complaints. (RO ¶ 76).

All other contentions that Arlington Ridge raised in this proceeding that were not specifically discussed above were considered and rejected by the ALJ. (RO ¶ 77).

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61, 62 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So. 2d

287, 289 n.3 (Fla. 5th DCA 1996).

Accordingly, the Secretary may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See e.g., Rogers v. Dep't of Health,* 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.,* 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cty. Sch. Bd.,* 652 So. 2d 894, 896 (Fla. 2d DCA 1995). The ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See e.g., Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1088* (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of HRS,* 462 So. 2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n,* 436 So. 2d 383, 389 (Fla. 5th DCA 1983).

If the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing the Final Order. *See, e.g., Walker v. Bd. of Prof'l Eng'rs,* 946 So. 2d 604, 605 (Fla 1st DCA 2006); *Fla. Dep't of Corr. v. Bradley,* 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Constr. Co. v. Dyer,* 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc., v. Roberts,* 498 So. 2d 622, 623 (Fla. 1st DCA 1986). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., Fla. Power & Light Co. v. Siting Bd.,* 693 So. 2d 1025, 1026-1027 (Fla. 1st DCA 1997); *North Port, Fla. v. Consol. Minerals,* 645 So. 2d 485, 487 (Fla. 2d DCA 1994).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield v. Dep't of Health,* 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1141-42 (Fla. 2d DCA 2001). However, the agency should not label what is essentially an ultimate factual determination as a "conclusion of law" in order to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Prof'l Eng'rs*, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007). Thus, the agency's review of legal conclusions in a recommended order is restricted to those that concern matters within the agency's field of expertise or "substantive jurisdiction." *See, e.g., Charlotte Cty. v. IMC Phosphates Co.*, 18 So. 3d at 1088; *G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004).

In addition, agencies do not have jurisdiction to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof'l Regulation*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); *Fla. Power & Light Co.*, 693 So. 2d at 1028. Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio,* 622 So. 2d at 609.

If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded, and the item treated as though it were actually a conclusion of law. *See, e.g., Battaglia Properties, Ltd., v. Fla. Land and Water Adjudicatory Comm'n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1994). However, neither should the agency label what is essentially an ultimate

factual determination as a "conclusion of law" to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes*, 952 So. 2d at 1225.

STANDARD OF REVIEW SPECIFIC TO CONSENT ORDERS

The Department in *M.A.B.E. Properties, Inc. v. Dep't of Envtl. Prot.*, Case No. 10- 2334 (Fla. DOAH Nov. 4, 2010; Fla. DEP Jan. 31, 2011), *aff'd per curiam, M.A.B.E. Properties, Inc. v. Dep't of Envtl Properties*, 84 So. 3d 1041 (Fla. 4th DCA 2012), identified the standard of review when a consent order has been challenged. In *M.A.B.E. Properties, Inc.*, the Department explained the standard of review for two classes of consent orders as follows:

> A consent order is a consensual administrative order authorized under §120.57(4), Florida Statutes, that is agreed to by the Department and one or more respondents. *Abbanat v. Reynolds and the Dep't of Envtl. Regulation*, 8 FALR 1989 (1987). DEP consent orders are of two classes. The first is a license or permit substitute that serves 'as authorization for a permittable type of activity that has not yet been conducted or is ongoing.' *Sarasata County v. Dep't of Envtl. Regulation and Falconer*, 8 FALR 1822, 1823 (1986). The second is a resolution of environmental violations that is designed to bring a violator back into compliance with the law. *Williams v. Moeller and Dep't of Envtl. Regulation*, 7 FALR 5537, 5541 (1986); *North Fort Myers Homeowners, Assoc., Inc. v. Dep't of Envtl. Regulation and Florida Cities Water Co., Inc.*, 14 FALR 1502 (1992). Consent orders that are permit substitutes are treated as if they were permits, and the Department must review those consent order[s] as such. *Abbanat*; *Williams* at 5542. When a substantially affected third party challenges an enforcement consent order, the appropriate standard of review is whether the Department has the burden of proving the consent order is a reasonable exercise of that discretion. *Falconer* at 1825. The abuse of discretion standard does not turn on whether the consent order embodies the best possible settlement or even whether a better settlement could have been reached, but rather, whether the settlement that was reached was reasonable under the circumstances. It merely needs to be appropriate given all of the factors that must be considered by the agency in reaching an agreement.
>
> . . .
>
> [T]he same reasoning applies to all enforcement consent orders: while a petitioner's substantial interests are affected by the adequacy of the corrective actions, if the corrective actions require the respondent to comply with the Department's permits, leases, orders, rules, or statutes and does not authorize the respondent to remain out of compliance with those requirements, then the consent order is *per se* reasonable.

M.A.B.E. Properties, Inc., Case No. 10-2334, FO at pp. 3-5.

RULINGS ON EXCEPTIONS

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker,* 677 So. 2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing,* 954 So. 2d 77 (Fla. 5th DCA 2007); *Fla. Dep't of Corrs.*, 510 So. 2d at 1124. Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coal. of Fla., Inc. v. Broward Cty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc. v. State of Fla., Agency for Health Care Admin.,* 847 So. 2d 540, 542 (Fla. 4th DCA 2003). However, even when exceptions are not filed, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat. (2019); *Barfield,* 805 So. 2d at 112; *Fla. Public Emp. Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

Finally, in reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* § 120.57(1)(k), Fla. Stat. (2019). However, the agency need not rule on an exception that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

RULINGS ON GI SHAVINGS EXCEPTIONS

GI Shavings' Exception No. 1: Exceptions to paragraphs 22, 27, and 32 of the RO

GI Shavings takes exception to the findings of fact in paragraphs 23, 27, and 32 of the RO, regarding the ALJ's findings of fact that particulate matter, smoke, odor and off-site impacts are originating from the GI Shavings facility.

However, the ALJ's findings in paragraphs 22, 27, and 32 regarding particulate matter, smoke and odor emanating from the GI Shavings facility are supported by competent substantial evidence in the form of expert testimony from Jeff Ruskin (Ruskin, T. Vol. I, pp. 103-104), and Joint Exhibit 1, pp. 110-111.

GI Shavings seeks to have DEP reweigh the evidence. However, DEP is not authorized to reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr. Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioner's Exception No. 1 as to paragraphs 23, 27, and 32 of the RO is denied.

GI Shavings' Exception No. 2: Exceptions to paragraphs 25 and 56 of the RO

GI Shavings takes exception to the findings of fact in paragraphs 25 and 56 of the RO that GI Shavings operated the facility throughout 2016. However, paragraph 56 of the RO does not state or imply that GI Shavings operated its facility through 2016.

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with

particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills*, 955 So. 2d at 62. The Department has been unable to locate competent substantial evidence to support the ALJ's finding that the GI Shavings operated the subject facility throughout 2016. As a result, GI Shavings' exception to the ALJ's finding of fact in paragraph 25 is granted. However, its exception to paragraph 56 is denied.

Based on the foregoing reasons, the Petitioner's Exception No. 2 is granted as to paragraph 25 and denied as to paragraph 56 of the RO.

GI Shavings' Exception No. 3: Exceptions to paragraph 32 of the RO

GI Shavings takes exception to the findings of fact in paragraph 32 of the RO alleging that the ALJ incorrectly stated that GI Shavings "submitted a permit modification on January 17, 2019." GI Shavings Exception to Paragraph 32, p. 5 (emphasis added). Instead, GI Shavings stated that it "submitted an application for a permit modification on January 17, 2017." GI Shavings Exception to Paragraph 32, p. 5 (emphasis added). GI Shavings filed this exception to paragraph 32 of the RO to correct the year in which it submitted its application for a permit modification.

After reviewing the RO and the Joint Exhibits, the Department concludes that GI Shavings is merely requesting a correction to a scrivener's error in the date it submitted its application for a permit modification. *See generally J.J. Taylor Companies v. Dep't of Bus. and Pro'f Regulation*, 724 So. 2d 192, 193 (Fla. 1st DCA 1999); *Battaglia Props., Ltd.*, 629 So. 2d at 168.

Based on the foregoing reasons, Petitioner's Exception No. 3 as to paragraph 32 of the RO is granted.

GI Shavings' Exception No. 4: Exceptions to paragraphs 34 and 69 of the RO

GI Shavings takes exception to part of the findings of fact in paragraphs 34 and 69 of the RO that describe an hours of operation agreement (HOA) and a startup, shutdown, and malfunction operating plan (SSMOP) as being part of the 007 permit.

However, competent substantial evidence supports that the SSMOP is part of the 007 Permit. Permit 007, which was issued on June 26, 2017, addresses both the HOA and the SSMOP on page 5 of the section titled Performance Restrictions under A.2. Section A.2. of Permit 007 states, in pertinent part:

A.2. Restricted Operation:

> a. The hours of operation for the Wood Chip Dryer with Cyclone Dust Collector are specified in a separate agreement (GI Shavings LLC Hours of Operation) between the Department and the permittee.
>
> . . .
>
> c. The procedures in the approved Startup, Shutdown, Malfunction, and Operation Procedure (SSMOP) must be met. The restrictions include wind directions and observation of the plume exiting the top of the main 40-foot exhaust stack.
> [Rule 62-210.200(47), Potential to Emit, F.A.C.]

Joint Ex. DEP 1, pp. 530-552. Section A.2.c. requires the permittee GI Shavings to comply with the conditions of the SSMOP, and thus is deemed a part of the 007 Permit. Moreover, DEP expert Rush testified that the SSMOP will "regulate the facility until such time as DEP approves a different SSMOP" and that the SSMOP in Permit 007, extended by Permit 008 will continue to govern the facility until a new permit is issued. (Rush, T. Vol. III, pp. 440-442). As a result, revisions or removal of the SSMOP would require a modification to the 007 Permit.

GI Shavings notes that the proposed 009 Permits' Notice of Intent states that "the operational hours agreement has been removed from the permit." DEP's expert witness Kim

Rush testified that the HOA was voluntary and the Department did not have the authority to require GI Shavings to incorporate these terms into future permits. However, DEP expert Rush also stated that the hours of operation agreement was an attachment to the 007 permit. (Rush, T. Vol. III, pp. 440-42). The ALJ's finding that the HOA continues to be a condition of GI Shavings current 008 Permit is thus supported by competent substantial evidence from DEP's expert Kim Rush.

GI Shavings' exception concludes by stating that "any findings that the HOA was improperly excluded from permit 009 should be reversed in the final order." GI Shavings Ex. 4 as to paragraphs 34 and 69 of the RO. Thus, GI Shavings takes exception to the ALJ's finding in paragraph 69 that "the HOA continues to be a condition of GI Shavings' current 008 Permit. The Department and GI Shavings did not present any persuasive evidence to show that this condition was now obsolete and should not be carried forward into the 009 Permit." (RO ¶ 69). However, the Department does not have the rule authority to require GI Shavings to incorporate the HOA terms into future permits, such as the 009 permit. The HOA agreement was a voluntary agreement between DEP and GI Shavings that is not required by the Department's air rules.

Based on the foregoing reasons, the Petitioner's Exception No. 4 as to paragraphs 34 and 69 of the RO regarding the SSMOP and the HOA is denied.

GI Shavings' Exception No. 5: Exceptions to paragraph 40 of the RO

GI Shavings takes exception to the findings of fact in paragraph 40 of the RO that black soot was on the filter during the October compliance test, and that the October compliance test was representative of normal operations.

The ALJ's finding in paragraph 40 that black soot was on the filter during the October compliance test is supported by competent substantial evidence. (Ferraro, T. Vol. II, p. 290). DEP is not authorized to reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. As a result, DEP may not reject this finding of fact.

GI Shavings also takes exception to an alleged finding of fact in paragraph 40 that the October compliance test was representative of normal operations. However, nowhere in paragraph 40 of the RO does it state that the October compliance test was representative of normal operations. As such, GI Shavings does not actually dispute any findings of fact regarding operation of the facility in paragraph 40 of the RO; and, for this reason, the Department rejects GI Shavings exceptions to paragraph 40 of the RO.

Based on the foregoing reasons, the Petitioner's Exception No. 5 as to paragraph 40 of the RO is denied.

GI Shavings' Exception No. 6: Exceptions to paragraph 53 of the RO

GI Shavings takes exception to the finding of fact in paragraph 53 of the RO that Ms. O'Brien's home smelled liked burning wood. However, the ALJ's finding in paragraph 53 is supported by competent substantial evidence (O'Brien, T. Vol. III, pp. 480).

GI Shavings seeks to have DEP reweigh the evidence. However, DEP is not authorized to reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr. Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioner's Exception No. 6 as to paragraph 53 of the RO is denied.

GI Shavings' Exception No. 7: Exceptions to paragraph 56 of the RO

GI Shavings takes exception to the finding of fact in paragraph 56 of the RO that " 'all' residents testified that they were impacted by 'black stuff' on their lanais when there is smoke coming from GI Shavings." GI Shavings Exception No. 7, p. 8.

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills*, 955 So. 2d at 62. The Department has been unable to locate competent substantial evidence to support the ALJ's finding that that "all" residents testified that they were impacted by black stuff on their lanais when there is smoke coming from GI Shavings.

Based on the foregoing reasons, the Petitioner's Exception No. 7 as to paragraph 56 of the RO that the finding of fact that " 'all' residents testified that they were impacted by 'black stuff' on their lanais when there is smoke coming from GI Shavings," is granted, and that sentence is removed from the final order.

GI Shavings' Exception No. 8: Exceptions to paragraphs 56 and 61 of the RO

GI Shavings takes exception to the findings of fact in paragraphs 56 and 61 of the RO that "complaints to the Department about GI Shavings increased in October due to GI Shavings 'increased operations to meet business demands.'" GI Shavings' Exception No. 8 to paragraph 56 and 61 of the RO. GI Shavings' exception contends that it did not increase its operations to meet increased demands. The Department finds that GI Shavings has misinterpreted both

paragraphs 56 and 61 of the RO. Paragraph 56 of the RO merely states that "the residents believed that an increase in hours of operation and no restriction on wind direction for GI Shavings would negatively impact their quality of life." (RO ¶ 56). Similarly, paragraph 61 of the RO merely states that "Despite overwhelming lay and expert evidence of ongoing objectionable odor violations, the Department sought only to resolve the August and October 2017 PM emission limit exceedances with the proposed Consent Order." (RO ¶ 61). Neither paragraph of the RO stated or implied that GI Shavings increased its operations in October 2017.

Based on the foregoing reasons, the Petitioner's Exception No. 8 as to paragraphs 56 and 61 of the RO is denied.

GI Shavings' Exception No. 9: Exceptions to paragraphs 60, 62, 72, 73, 74, and 76 of the RO

GI Shavings takes exception to the findings of fact in paragraphs 60, 62, 72, 73, 74, and 76 of the RO that the black stuff or particulate matter in dispute is being caused by the GI Shavings facility, and that the black stuff or particulate matter contributes to an odor.

The ALJ's findings in paragraphs 60, 62, 72, 73, 74, and 76 of the RO that the emissions from the GI Shavings' facility, including but not limited to the particulate matter, are creating an odor are supported by competent substantial evidence from expert testimony and numerous residents at the Arlington Ridge community. (Hait, T. Vol. I, p. 63; Piersall, T. Vol. I, p. 109; Lugo, T. Vol. I, pp. 132-133; Deforge, T. Vol. II, pp. 193, 209-210; Salzman, T. Vol. II, pp. 218, 227, 228, 230, 232, 249-250; Dennison, T. Vol. III, pp. 348-349; Petitioner's Exhibit Composite 8: 367 consent and joinder forms and comment forms).

Based on the foregoing reasons, the Petitioner's Exception No. 9 as to paragraphs 60, 62, 72, 73, 74, and 76 of the RO is denied.

GI Shavings' Exception No. 10: Exceptions to paragraph 62 of the RO

GI Shavings takes exception to the finding of fact in paragraph 62 of the RO that a "baghouse was a reasonable requirement for the GI Shavings facility." GI Shavings Exception No. 10, p. 13. GI Shavings alleges that the finding of fact that a baghouse was a reasonable requirement to include in the proposed Consent Order for the GI Shavings facility is not supported by credible substantial evidence and should be disregarded.

After reviewing the entire record, including the hearing transcript and hearing exhibits, the Department does not find any competent substantial evidence to support the ALJ's last sentence in paragraph 62 of the RO that the "adequate and reasonable course of action would be to order GI Shavings to both install a bag house and perform the rerating of the burner." (RO ¶ 62). Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may reject the ALJ's findings of fact if the agency determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Since the Department cannot find any competent substantial evidence to support the ALJ's finding that the "adequate and reasonable course of action would be to order GI Shavings to both install a bag house and perform the rerating of the burner"; this finding is rejected.

Based on the foregoing reasons, the Petitioner's Exception No. 10 as to paragraph 62 of the RO is granted. Consequently, the last sentence of paragraph 62 of the RO is stricken.

GI Shavings' Exception No. 11: Exceptions to paragraph 61 of the RO

GI Shavings takes exception to the findings of fact in paragraph 61 of the RO that there was "overwhelming lay and expert evidence of ongoing objectionable odor violations." (RO

¶ 61).

However, the ALJ's finding in paragraph 61 is supported by competent substantial evidence (Hait, T. Vol. I, p. 63; Piersall, T. Vol. I, p. 109; Lugo, T. Vol. I, pp. 132-133; Deforge, T. Vol. II, pp. 193, 209-210; Salzman, T. Vol. II, pp. 218, 227, 228, 230, 232, 249-250; Dennison, T. Vol. III, pp. 348-349; Petitioner's Exhibit Composite 8: 367 consent and joinder forms and comment forms).

GI Shavings seeks to have DEP reweigh the evidence. However, DEP is not authorized to reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr. Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Based on the foregoing reasons, the Petitioner's Exception No. 11 as to paragraph 61 of the RO is denied.

GI Shavings' Exception No. 12: Exceptions to paragraphs 68 and 74 of the RO

GI Shavings takes exception to the findings of fact in paragraphs 68 and 74 of the RO to the extent that they "find that any particulate matter standards [are] applicable to the [GI Shavings] facility." GI Shavings Exception No. 12 to paragraphs 68 and 74 of the RO.

Paragraph 68 of the RO states that "Ms. Rush testified that the only PM expected from the facility was PM10." Therefore, the ALJ's finding in paragraph 68 of the RO is supported by competent substantial evidence. (Rush, T. Vol. III, p. 409).

Paragraph 74 of the RO does not include findings that any particulate matter standards apply to the GI Shavings facility. For that reason alone, Exception No. 12 to paragraph 74

should be denied.

Moreover, the competent substantial evidence establishes that particulate matter criteria currently apply to the GI Shavings facility, because the 009 permit, and its modifications to the burner capacity to less than 30 million Btu per hour total heat input, has not been issued due to the current permit challenge. GI Shavings is presently operating under the 008 permit extension to the 007 permit, which contains a particulate matter limit located in rule 62-296.410(2)(b), Florida Administrative Code. The proposed 009 permit, under challenge, requests to change the regulatory standard from rule 62-296.410(2)(b), Florida Administrative Code, to rule 62-296.410(2)(a), Florida Administrative Code, which would remove the particulate matter limit. However, the proposed 009 permit has not been issued, because it is under challenge, Hence, the existing 008 permit extension to the 007 permit, which contains a particulate limit, continues to apply to the GI Shavings facility. In addition, the proposed Consent Order states in paragraph 10 that GI Shavings "shall comply with all terms and conditions of permit amendment 0694866-**008**-AC" until a new permit is issued." (emphasis added). Because the 009 permit is under challenge, a new permit has not been issued.

Based on the foregoing reasons, the Petitioner's Exception No. 12 as to paragraphs 68 and 74 of the RO is denied.

GI Shavings' Exception No. 13: Exceptions to paragraph 75 of the RO

GI Shavings takes exception to the use of the word "utility" in the findings of fact in paragraph 75 of the RO and attempts to re-characterize paragraph 75 as a conclusion of law. However, paragraph 75 of the RO does not "impose a requirement that a Consent Order meet some threshold of 'utility' in order to be valid," as stated by GI Shavings' exception. Instead, the Department finds that the ALJ merely found that the "utility" or usefulness of the proposed

Consent Order was lessened for the factual reasons stated within paragraph 75 of the RO.

Based on the foregoing reasons, the Petitioner's Exception No. 13 as to paragraph 75 of the RO is denied.

GI Shavings' Exception No. 14: Exceptions to paragraphs 79, 80, and 81 of the RO

GI Shavings takes exception to the conclusions of law in paragraphs 79, 80, and 81 of the RO that conclude Arlington Ridge has standing to challenge both the draft 009 air permit and the proposed Consent Order. The ALJ concluded that Arlington Ridge had a substantial interest that reasonably could be affected by the agency action in question, and that the injury is of the type that the proceeding is designed to protect. (RO ¶¶ 79-81). Thus, the ALJ concluded that Arlington Ridge had standing to initiate this proceeding pursuant to sections 120.569 and 120.57, Florida Statutes.

The DOAH record reflects that the ALJ afforded Arlington Ridge all the rights provided by the Administrative Procedures Act to a party claiming its substantial interests would be affected by the DEP action being challenged in this case. During the DOAH hearing, Arlington Ridge presented arguments, testimony, and documentary evidence in support of the merits of its claims, and its basis for standing. Arlington Ridge filed a Proposed Recommended Order and Exceptions to the RO; and, these Exceptions have been addressed on their merits in the RO and this Final Order.

Because Arlington Ridge's claims were litigated on their merits in the DOAH hearing and are addressed in the ALJ's RO, the issue of its standing is moot at this administrative stage of these proceedings. *See Hamilton Cty. Bd. of Cty. Comm'rs v. Dep't of Envtl. Reg.*, 587 So. 2d 1378, 1383 (Fla. 1st DCA 1991) (concluding that the issue of Hamilton County's standing to challenge a DER permitting action was moot on appellate review, because the "issues were fully

litigated in the proceedings below."); *Okaloosa Cty. v. Dep't of Envtl. Reg.*, ER F.A.L.R. 1992: 032, p. 6 (Fla. DER 1992) (concluding that, from a practical standpoint, the issue of Okaloosa County's standing was moot, because the County's substantive claims had been litigated on their merits at the DOAH final hearing); *Suncoast Waterkeeper, Inc. v. Dep't of Envtl. Prot.*, Case No. 17-0795 and 17-0796 (Fla. DOAH March 6, 2018; Fla. DEP April 27, 2018)(the issue of Suncoast Waterkeeper's standing was moot, because the issues were fully litigated in the DOAH proceeding).

Based on the foregoing reasons, the Petitioner's Exception No. 14 as to paragraphs 79, 80, and 81 of the RO is denied.

GI Shavings' Exception No. 15: Exceptions to paragraphs 73, 84, 87, 88, 89, 90, 91, 92, and 93

GI Shavings takes exception to the findings of fact in paragraph 73 that "the GI Shavings facility emits fine PM or 'black soot' into the outdoor atmosphere, which by itself or in combination with other odors, unreasonably interferes with the comfortable use and enjoyment of life or property at the Arlington Ridge community, and which creates a nuisance." However, the ALJ's findings of fact in paragraph 73 (and any findings of fact in paragraphs 84, 87, 88, 89, 90, 91, 92 and 93) are supported by competent substantial evidence. (Hait, T. Vol. I, p. 63; Piersall, T. Vol. I, p. 109; Lugo, T. Vol. I, pp. 132-133; Deforge, T. Vol. II, pp. 193, 209-210; Salzman, T. Vol. II, pp. 218, 227, 228, 230, 232, 249-250; Dennison, T. Vol. III, pp. 348-349; Petitioner's Exhibit Composite 8: 367 consent and joinder forms and comment forms).

GI Shavings also takes exception to any conclusions of law in paragraphs 84, 87, 88, 89, 90, 91, 92, and 93 of the RO that conclude odor emitted from the GI Shavings facility creates a nuisance.

Paragraphs 84 and 87 of the RO do not mention the Arlington Ridge residents' use and

enjoyment of their life or property or the concept of creating a nuisance; and thus, GI Shavings' exceptions to paragraphs 84 and 87 of the RO are denied.

Paragraph 88 of the RO quotes the air program's definition of "Objectionable Odor" from rule 62-210.200(177), Florida Administrative Code. Since it quotes the definition verbatim, the Department denies GI Shavings' exception to paragraph 88 of the RO.

Paragraph 90 of the RO quotes the test for an actionable nuisance from *Nitram Chems., Inc. v. Parker*, 200 So. 2d 220, 231 (Fla. 2d DCA 1967). GI Shavings did not provide any basis, legal or otherwise, to reject this paragraph; and thus, the exception to paragraph 90 of the RO should be denied. *See* § 120.57(1)(l), Fla. Stat. (2019). Having filed no legal basis for the exception to paragraph 90 of the RO, GI Shavings has waived any objection it may have to this paragraph. *See Envtl. Coal. of Fla., Inc.,* 586 So. 2d at 1213. For this reason, the Department denies GI Shavings' exception to paragraph 90 of the RO.

Paragraph 91 of the RO specifies that a "party pleading nuisance must also establish that the use complained of is the actual, proximate cause of the injury," citing to Florida caselaw. GI Shavings does not object to this conclusion of law. In fact, GI Shavings quotes the RO's legal quotation and case citation. For this reason, the Department denies GI Shavings' exception to paragraph 91 of the RO.

Paragraph 92 of the RO quotes the air program's definition of an "emission" from rule 62-210.200(93), Florida Administrative Code, and quotes language from rule 62-296.320(2), Florida Administrative Code. Since it quotes the definition in rule 62-210.200 and the text from rule 62-296.320 verbatim, the Department must accept the quotations from our own rules. Moreover, GI Shavings did not provide any basis, legal or otherwise, to reject this paragraph; and thus, the exception to paragraph 92 of the RO should be denied. *See* § 120.57(1)(l), Fla. Stat.

(2019). Having filed no legal basis for the exception to paragraph 92 of the RO, GI Shavings has waived any objection it may have to this paragraph. *See Envtl. Coal. of Fla., Inc.*, 586 So. 2d at 1213. For these reasons, the Department denies GI Shavings' exception to paragraph 92 of the RO.

Paragraph 93 of the RO concludes that "GI Shavings did not provide reasonable assurance that the construction or modification of its emissions unit would not result in violations of applicable provisions of Chapter 403 and Department air pollution rules." (RO ¶ 93). GI Shavings did not provide any basis, legal or otherwise, to reject this paragraph; and thus, the exception to paragraph 93 of the RO should be denied. *See* § 120.57(1)(l), Fla. Stat. (2019). Having filed no legal basis for the exception to paragraph 93 of the RO, GI Shavings has waived any objection it may have to this paragraph. *See Envtl. Coal. of Fla., Inc.*, 586 So. 2d at 1213. For this reason, the Department denies GI Shavings' exception to paragraph 93 of the RO.

Based on the foregoing reasons, the Petitioner's Exception No. 15 as to paragraphs 73, 84, 88, 89, 90, 91, 92, and 93 of the RO is denied.

GI Shavings' Exception No. 16: Exceptions to paragraphs 84 and 93 of the RO

GI Shavings takes exception to the conclusions of law in paragraphs 84 and 93 of the RO alleging that the ALJ improperly shifted the burden of persuasion to GI Shavings in violation of the statutory mechanism in section 120.569(2)(p), Florida Statutes, that establishes the burden of proof for issuance of a permit under chapter 403, Florida Statutes.

GI Shavings agreed with the ALJ's conclusions of law in paragraph 82, which states:

> 82. Arlington Ridge challenged issuance of an air construction permit issued under chapter 403, Florida Statutes, and applicable air pollution rules. Therefore, section 120.569(2)(p) governs this proceeding. Under this provision, the permit applicant must present a prima facie case demonstrating entitlement to the permit. Thereafter, the nonapplicant third party has the burden "of ultimate persuasion" and the burden "of going forward to prove the case in opposition to

> the . . . permit." If the third party fails to carry its burden, the applicant prevails by virtue of its prima facie case.

RO ¶ 82. The Department agrees with the ALJ's above interpretation of the legal burden of proof for permits issued under chapter 403, Florida Statutes.

GI Shavings, however, disagrees with the ALJ's conclusion in paragraph 84 of the RO that "Arlington Ridge carried its burden and overcame GI Shavings' prima facie case." (RO ¶ 84). GI Shavings then contends that the ALJ improperly shifted the burden to GI Shavings in paragraph 93 of the RO.

The Department concludes that the ALJ's conclusions of law in paragraphs 84 and 93 of the RO must be read in *pari materia* and in conjunction with the ALJ's findings throughout the RO. In paragraph 84, the ALJ concluded that GI Shavings presented a prima facie case of entitlement to the proposed permit, which "shifted the burden of ultimate persuasion to [Petitioner] Arlington Ridge to prove its case in opposition to the permit by a preponderance of the competent and substantial evidence." (RO ¶ 84). However, the ALJ then concluded that "Arlington Ridge carried its burden and overcame GI Shavings' prima facie case. (citation omitted)." The ALJ reached this conclusion based on her findings in the Findings of Fact portion of the RO. The ALJ's conclusions of law in paragraph 93 when read in *pari materia* with her conclusions of law in paragraph 84 are intended to make clear that GI Shavings does not qualify for the proposed permit because the Petitioner Arlington Ridge proved its case in opposition to the permit.

GI Shavings seeks to have DEP reweigh the evidence. However, DEP is not authorized to reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307.

Based on the foregoing reasons, the Petitioner's Exception No. 16 as to paragraphs 84 and 94 of the RO is denied.

GI Shavings' Exception No. 17: Exceptions to paragraphs 64, 95, 96, and 97 of the RO

GI Shavings takes exception to the conclusions of law in paragraphs 64, 95, 96, and 97 of the RO alleging that these conclusions of law were erroneous, because the agency retains discretion over what violations should be addressed in a consent order and the amount of penalties assessed in a consent order.

In *M.A.B.E. Properties, Inc.*, the Department explained there are two types of consent orders. The first is a license or permit substitute that serves "as authorization for a permittable type of activity that has not yet been conducted or is ongoing." *M.A.B.E. Properties, Inc.*, Case No. 10-2334, FO at p. 3, *quoting, Falconer*, 9 F.A.L.R. at 1823. The second is a resolution of environmental violations that is designed to bring a violator back into compliance with the law. *M.A.B.E. Properties, Inc.*, Case No. 10-2334, FO at p. 2, *citing, Williams*, 7 F.A.L.R. at 5541, and *North Fort Myers Homeowners, Ass'n, Inc.*, 14 F.A.L.R. at 1504. When a substantially affected third party challenges an enforcement consent order, the Department has the burden of proving the consent order is a reasonable exercise of its enforcement discretion. *Falconer*, 9 F.A.L.R. at 1825; *M.A.B.E. Properties, Inc.*, Case No. 10-2334, FO at pp. 3-5. Furthermore, as the Department pointed out in *M.A.B.E. Properties, Inc.*, "the decision to initiate enforcement is a matter that rests within the enforcement discretion of the Department." *M.A.B.E. Properties, Inc.*, Case No. 10-2334, FO at p. 4.

The Consent Order under challenge is the second type of enforcement consent order that is designed to bring a violator back into compliance with the law. GI Shavings previously was in violation of the particulate matter criteria when its equipment was rated at a design rate

maximum over 30 mmBtu/hr and may have likewise been in violation of the odor criteria. The Consent Order only finds violations of the Department's particulate matter criteria and imposes corrective actions to redress these violations. Specifically, it requires GI Shavings to either (a) install pollution control equipment and thereby comply with rule 62-296.410(2)(b), Florida Administrative Code, or (b) rerate the burner bringing the facility into compliance with rule 62-296.410(2)(a), Florida Administrative Code, which contains no particulate matter limits. GI Shavings rerated its equipment at a design rate maximum of 26 mmBtu/hr with an actual rate of 21 mmBtu/hr. As a result, GI Shavings is no longer in violation of the particulate matter limit.

"The decision to initiate enforcement is a matter that rests within the enforcement discretion of the Department." *M.A.B.E. Properties, Inc.*, Case No. 10-2334, FO at p. 4, *quoting, North Fort Myers Homeowners, Ass'n, Inc.*, 14 F.A.L.R. at 1504. The Department may use its enforcement discretion to take enforcement action against some but not all violations at a facility. Under the standard identified in *M.A.B.E. Properties, Inc.*, the second type of consent order designed to bring a violator back into compliance with the law is considered per se reasonable "if the corrective actions require the respondent to comply with the Department's permits, leases, orders, rules, or statutes and does not authorize the respondent to remain out of compliance with those requirements." *M.A.B.E. Properties, Inc.*, Case No. 10-2334, FO at p. 5. The proposed Consent Order is per se reasonable, because it brings GI Shavings back into compliance with the particulate matter limit, the only violation addressed by the Consent Order.

The Department concludes that paragraph 64 of the RO contains mixed findings of fact and conclusions of law. The RO's last sentence in paragraph 64 is a conclusion of law that gave GI Shavings a choice of corrective actions in the proposed Consent Order, which the ALJ concluded was not a reasonable exercise of the DEP's enforcement discretion.

The ALJ in paragraph 95 of the RO concludes that the terms of the proposed Consent Order were not a reasonable exercise of the Department's enforcement discretion.

The ALJ in paragraph 96 of the RO concludes that the corrective measures outlined in the proposed Consent Order were not reasonable considering the applicable rules, the violations addressed, and the testimony and evidence presented at hearing.

The ALJ in paragraph 97 of the RO concludes that "the Department also abused its enforcement discretion when it did not require a penalty sufficiently large enough to ensure future compliance." (RO ¶ 97).

The *M.A.B.E. Properties, Inc.* case also addressed the matter of penalties in a consent order:

> [W]hen, as here, the corrective actions require respondent to comply with the law – including permits, leases, Department rules, or statutes – the adequacy of the penalty is a matter solely in the enforcement discretion of the Department, because the corrective actions are per se reasonable and the amount of the penalty in that circumstance does not affect the substantial interests of the petitioner.

M.A.B.E. Properties, Inc., Case No. 10-2334, FO at p. 4.

As explained above, the proposed Consent Order requires GI Shavings to either (a) install pollution control equipment and thereby comply with rule 62-296.410(2)(b), Florida Administrative Code, or (b) rerate the burner bringing the facility into compliance with rule 62-296.410(2)(a), Florida Administrative Code, which contains no particulate matter limits. GI Shavings rerated its equipment at a maximum firing rate of 26 mmBtu/hr with an actual rate of 21 mmBtu/hr. The rerating of the facility's burner brings GI Shavings' facility into compliance with DEP's air regulations and its air construction permit; and thus, the Consent Order is per se reasonable. *See* Consent Order ¶ 12. Consequently, the adequacy of the penalty is a matter solely in the enforcement discretion of the Department.

The conclusions of law in paragraphs 64, 95, 96, and 97 of the RO are ones over which the Department has substantive jurisdiction. Under section 120.57(1)(l), Florida Statutes, an "agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction . . . ." § 120.57(1)(l), Fla. Stat. (2019). The Department rejects the conclusions of law in paragraphs 64, 95, 96, and 97 of the RO. For the reasons cited above, the Department's interpretations regarding these paragraphs is more reasonable than that of the ALJ. *See* § 120.57(1)(l), Fla. Stat. (2019).

Based on the foregoing reasons, the Petitioner's Exception No. 17 as to paragraphs 64, 95, 96, and 97 of the RO is granted.

RULINGS ON ARLINGTON RIDGE'S EXCEPTIONS

Arlington Ridge's Exception No. 1: Exception to paragraph 95 of the RO

Arlington Ridge takes exception to the conclusions of law in paragraph 95 of the RO that the "more persuasive evidence adduced at the final hearing established that the terms of the proposed Consent Order were not a reasonable exercise of the Department's enforcement discretion under the circumstances," citing to the *M.A.B.E. Properties, Inc.* final order. (RO ¶ 95). Arlington Ridge's exception requests that the Department supplement paragraph 95 of the RO to indicate "that the Department's failure to enforce the terms of the executed Consent Order constitutes an independent and additional abuse of enforcement discretion in this case."

Arlington Ridge asks the Department to make supplemental findings of fact regarding its authority to exercise enforcement discretion. However, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., Fla. Power & Light Co.*, 693 So. 2d at 1026-1027; *North Port, Fla.*, 645 So. 2d at 487.

Based on the foregoing reasons, Arlington Ridge's Exception No. 1 as to paragraph 95 of the RO is denied.

RULINGS ON DEP'S EXCEPTIONS

DEP's Exception No. 1: Exceptions to paragraphs 95 and 96 of the RO

DEP takes exception to the conclusions of law in paragraph 95 of the RO that states "the terms of the proposed Consent Order were not a reasonable exercise of the Department's enforcement discretion under the circumstances," citing to page 3 of the Department's *M.A.B.E. Properties, Inc.* final order.

The proposed Consent Order with GI Shavings only addresses control of particulate matter emissions from the facility and does not address other potential violations at the facility. The Department agrees with DEP's legal conclusion that "[a]llegations that a consent order fails to address all existing or potential violations by the respondent are not subject to administrative review," *citing*, *West Coast Reg'l Water Supply Auth. v. Central Phosphates, Inc.*, 11 FALR 1917, 1938 (1988). DEP Exceptions No. 1, p. 3. Furthermore, as pointed out in *M.A.B.E. Properties, Inc.* the Petitioners have a remedy if they believe there are violations not resolved in a Consent Order since "the citizen suit provision in § 403.412(2), Florida Statutes, authorizes any citizen of the state to maintain an action for injunctive relief for violation of the state's environmental laws. *M.A.B.E. Properties, Inc.*, Case No. 10-2334, FO at p. 2.

As explained herein above in the section titled Standard of Review specific to Consent Orders, the *M.A.B.E. Properties, Inc.* case identifies the standard of review when a consent order has been challenged. In *M.A.B.E. Properties, Inc.*, the Department explained there are two types of consent orders. The first is a license or permit substitute that serves "as authorization for a permittable type of activity that has not yet been conducted or is ongoing." *M.A.B.E. Properties,*

Inc., Case No. 10-2334, FO at p. 3, *quoting, Falconer*, 9 F.A.L.R. at 1823. The second is a resolution of environmental violations that is designed to bring a violator back into compliance with the law. *M.A.B.E. Properties, Inc.,* Case No. 10-2334, FO at p. 2, *citing, Williams*, 7 F.A.L.R. at 5541, and *North Fort Myers Homeowners, Ass'n, Inc.*, 14 F.A.L.R. at 1504. The Consent Order under challenge is the second type of enforcement consent order that is designed to bring a violator back into compliance with the law.

The proposed Consent Order only finds violations of the Department's particulate matter criteria and imposes corrective actions to redress these violations. Specifically, it requires GI Shavings to either (a) install pollution control equipment and thereby comply with rule 62-296.410(2)(b), Florida Administrative Code, or (b) rerate the burner bringing the facility into compliance with rule 62-296.410(2)(a), Florida Administrative Code, which contains no particulate matter limits. GI Shavings rerated its equipment at a design rate maximum of 26 mmBtu/hr with an actual rate of 21 mmBtu/hr. As a result, GI Shavings is no longer in violation of the particulate matter limit.

"The decision to initiate enforcement is a matter that rests within the enforcement discretion of the Department." *M.A.B.E. Properties, Inc.,* Case No. 10-2334, FO at p. 4, *quoting, North Fort Myers Homeowners, Ass'n, Inc.*, 14 F.A.L.R. at 1504. The Department may use its enforcement discretion to take enforcement action against some but not all violations at a facility. Under the standard identified in *M.A.B.E. Properties, Inc.*, the second type of consent order designed to bring a violator back into compliance with the law is considered per se reasonable, "if the corrective actions require the respondent to comply with the Department's permits, leases, orders, rules, or statutes and does not authorize the respondent to remain out of compliance with those requirements." *M.A.B.E. Properties, Inc.*, Case No. 10-2334, FO at p. 5.

The proposed Consent Order is per se reasonable, because under either option, GI Shavings' facility is brought back into compliance with the particulate matter limit, the only violation addressed by the Consent Order.

An "agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction." § 120.57(1)(l), Fla. Stat. (2019). The Department has substantive jurisdiction over interpretation of its air regulations and application of such interpretation to the challenged Consent Order. For the reasons cited above, the Department's interpretation is more reasonable than that of the ALJ. *See* § 120.57(1)(l), Fla. Stat. (2019).

Based on the foregoing reasons, DEP's Exception No. 1 as to paragraphs 95 and 96 of the RO is granted.

DEP's Exception No. 2: Exceptions to the Conclusion and Recommendation of the RO

DEP takes exception to the "Conclusion" and Recommendation of the RO that the proposed Consent Order should be disapproved.

DEP does not identify the disputed portion of the "Conclusion" by page number or paragraph and does not include specific citations to the record. Consequently, the Department is unable to identify what concepts to which DEP is excepting regarding the "Conclusions."

The agency need not rule on an exception that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *See* 120.57(1)(k), Fla. Stat. (2019). As a result, the Department rejects DEP's exception to the "Conclusion" of the RO.

DEP also takes exception to the Recommendation of the RO that the proposed Consent

Order be denied, contending that DEP did not abuse its enforcement discretion in agreeing to the consent order under challenge. *M.A.B.E. Properties, Inc.*, Case No. 10-2334, FO at pp. 3-5. DEP notes that the ALJ concludes that rule 62-296.410(2)(a) now applies to this facility, and this rule does not have a PM emission limitation. DEP concludes that since the "scope of the Consent Order was limited to PM exceedances, and it resolves that violation, the Consent Order should be upheld." DEP's Exception No. 2 at pp. 3-4.

The Department agrees with the ALJ and DEP that rule 62-296.410(2)(a), Florida Administrative Code, applies to this rerated facility, and that this rule does not contain a PM emission limitation. The Department's ruling in DEP Exception No. 1 is adopted herein. For the reasons contained therein, the Department grants DEP's exception to the Recommendation of the RO that recommends the proposed Consent Order be disapproved.

An "agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction." § 120.57(1)(l), Fla. Stat. (2019). The Department has substantive jurisdiction over interpretation of its air regulations and application of such interpretation in the challenged Consent Order. For the reasons cited above, the Department's interpretation is more reasonable than that of the ALJ. *See* § 120.57(1)(l), Fla. Stat. (2019).

Based on the foregoing reasons, DEP's Exception No. 2 as to the Conclusion and Recommendation of the RO is granted in part and denied in part.

CONCLUSION

Notwithstanding the conclusion below approving the Consent Order, the record developed during this case raises issues concerning objectionable odors emanating from GI Shavings' facility. Accordingly, Department staff shall consider the findings in this Order related to objectionable odors as well as any other additional information staff might have available at this time, and take any further action as is necessary.

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

ORDERED that:

A. The ALJ's Recommended Order (Exhibit A) is adopted, except as modified by the above rulings on Exceptions, and incorporated by reference herein.

B. DEP Air Permit No. 0694866-009-AC is DENIED.

C. The Consent Order between the Florida Department of Environmental Protection and GI Shavings, L.L.C. (OGC No. 18-0077), dated April 20, 2018, is APPROVED.

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the

appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 13th day of September, 2019, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

NOAH VALENSTEIN
Secretary

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

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

Deputy Clerk — CLERK

9/13/19
DATE

CERTIFICATE OF SERVICE

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

Stephen "Toby" Tobias Snively, Esq. John L. Di Masi, Esq. Law Offices of John L. Di Masi, P.A. 801 North Orange Ave., Suite 500 Orlando, FL 32801 tsnively@orlando-law.com jdimasi@orlando-law.com	Dorothy E. Watson, Esq. Foley & Lardner, LLP 111 N. Orange Ave., Suite 1800 Orlando, FL 32801 dwatson@foley.com droman@foley.com
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this 13th day of September, 2019.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ARLINGTON RIDGE COMMUNITY
ASSOCIATION, INC.,

Petitioner,

vs. Case No. 18-5297

GI SHAVINGS, LLC, AND DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

RECOMMENDED ORDER

A duly-noticed final hearing was held in this matter on January 9 and 10, 2019, in Orlando, Florida. The final hearing was conducted by the Honorable Francine M. Ffolkes, an Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUES

There are three issues to be determined in this case: (1) whether the Petitioner, Arlington Ridge Community Association, Inc. (Arlington Ridge), demonstrated standing to challenge the proposed agency actions; (2) whether the terms of Consent Order OGC No. 18-0077 (proposed Consent Order) constituted a reasonable exercise of the Respondent, Department of Environmental Protection's (Department), enforcement discretion; and (3) whether the Department's notice of intent to issue minor source air construction permit 0694866-009-AC (009 Permit) to the Respondent, GI Shavings, LLC (GI Shavings), met the applicable rule and statutory criteria for issuance.

PRELIMINARY STATEMENT

On April 20, 2018, the Department and GI Shavings entered into the proposed Consent Order to address certain 2017 violations of GI Shavings' then existing air construction permit. On January 31, 2018, GI Shavings submitted an application for a revision of its air construction permit under the terms of the proposed Consent Order. On March 1, 2018, the Department issued

a notice of intent to issue minor source air construction permit with the draft 009 Permit attached.

On April 26, 2018, Arlington Ridge filed a petition for administrative hearing (Petition) challenging the draft 009 Permit and the proposed Consent Order. On October 3, 2018, the Department transmitted the Petition to the Division of Administrative Hearings, and the case was assigned DOAH Case No. 18-5297.

In advance of the final hearing, the parties filed an Amended Joint Pre-hearing Stipulation (Stipulation) that included stipulated facts and issues of law on which there was agreement.

At the hearing, Arlington Ridge presented the expert testimony of Mitchell Hait, Ph.D.; and the fact testimony of Robert Salzman, president of Arlington Ridge. Arlington Ridge also presented the fact testimony of Dennis Hartman, James Piersall, Rhonda Lugo, Cheryl Thomack, Sherry O' Brien, Michael Becker, Douglas DeForge, Elise Dennison, and Sabrina Hughes. Arlington Ridge presented the expert testimony of Shawn Dolan; and the fact testimony of Jeff Rustin, a permit engineer with the Department's Central District Office. Arlington Ridge Exhibits 1 through 9 were admitted into evidence.

On January 22, 2019, Arlington Ridge filed its motion to designate portions of the deposition transcript of Glenn Semanisin, a professional engineer with Grove Scientific and

Engineering Company, for admission into evidence. On January 28, 2019, GI Shavings and the Department filed joint objections and cross-designations. The joint objections are overruled, and the designated and cross-designated portions of Glenn Semanisin's deposition are admitted into evidence.

GI Shavings presented the expert testimony of Bruno Ferraro, president of Grove Scientific and Engineering Company; the fact testimony of Guiremer Rodriguez, the plant manager for the GI Shavings facility; and, on rebuttal, the fact testimony of Briana Gowan, an environmental specialist with the Department's Central District Office. GI Shavings Exhibits 1, 5, 7, and 8 were admitted into evidence.

The Department presented the expert and fact testimony of Kimberly Rush, permitting program administrator for the Central District Office, who is a professional engineer. Department Exhibit 3 was admitted into evidence without objection. Department Exhibits 1 and 2 were admitted into evidence without objection as joint exhibits.

The four-volume Transcript of the final hearing was filed with DOAH on March 8, 2019. The parties timely submitted their proposed recommended orders on March 28, 2019.

References to the Florida Statutes are to the 2018 version, unless otherwise indicated.

FINDINGS OF FACT

The Parties

1. The Arlington Ridge community is located in Lake County comprising approximately 500 acres. The community is a 55-year-old plus active adult community with approximately 730 homes. The community includes an 18-hole golf course, swimming pool, tennis courts, pickle ball courts, walking trails, conservation areas, and common areas.

2. Arlington Ridge is a Florida not-for-profit community association governed by its Declaration of Restrictive Covenants for Arlington Ridge, recorded on April 15, 2005, at Official Records Book 2809, Page 1622, of the Public Records of Lake County, Florida, as amended. Arlington Ridge's Articles of Incorporation demonstrate that it was formed, in part, to promote the health, safety, and welfare of the owners within its community and to provide for the ownership, operation, maintenance, and preservation of the common areas.

3. Arlington Ridge is made up of the Declarant, CB Arlington Ridge Landco, LLC, as long as the Declarant still owns lots and the residents who own lots. Robert Salzman is vice president of the Declarant. He serves as president and is a member of the board of directors of the community association. The Declarant still owns 170 undeveloped lots and 91 lots that are under development. There are 730 existing homes that are

owned by individual residents who are members of the community association along with the Declarant. The community association owns a section of the roadway and land around the rear gate of the subdivision.

4. GI Shavings is a Florida limited liability company and is the applicant for the minor source air construction permit at issue in this proceeding. The GI Shavings property is located adjacent to the Arlington Ridge community. The address is 26444 County Road 33, Okahumpka, Lake County, Florida 34736. GI Shavings also signed the proposed Consent Order at issue in this proceeding.

5. The Department is the administrative agency of the state having the power and duty to protect Florida's air and water resources and to administer and enforce the provisions of chapter 403, Florida Statutes, and rules promulgated thereunder in Florida Administrative Code Title 62 regarding activities which have the potential to cause air pollution.

Facility History of Permitting and Operations

6. On February 7, 2014, GI Shavings' predecessor, Quality Shavings of South Florida, LLC, applied to the Department for an initial air construction permit. The application described the proposed project as a wood chip dryer that included a 30 million British thermal unit per hour (mmBtu/hr) burner fueled by wood chips and sawdust. The burner provided heat to the rotary kiln

chip dryer and exhausted to a cyclone dust separator prior to venting to the atmosphere through an exhaust stack. The application materials contained information about the United States Environmental Protection Agency's (USEPA) AP-42 emissions factors for combustion of wood products, with estimations of regulated air pollutant potential and estimated actual emissions from the wood chip drying process.

7. The potential emissions for each pollutant and group of pollutants were listed in tons per year (TPY), and were based on a 30 mmBtu/hr facility running 8,760 hours per year, i.e., no hourly limit. The estimated actual emissions were based on the facility running a typical production schedule of 3,600 hours per year.

8. The listed air pollutants were carbon monoxide (CO), nitrous oxides (NOX), particulate matter (PM), volatile organic compounds (VOCs), sulphur dioxide (SO2), carbon dioxide (CO2), and hazardous air pollutants (HAPs). Although there were potential emissions and estimated actual emissions for each pollutant and group of pollutants, the major source thresholds were not triggered. Therefore, the facility would be classified, from a regulatory standpoint, as a minor source of air pollution.

9. The only air pollution control device was the cyclone dust separator that was rated at 99 percent removal efficiency for PM10, i.e., particulate matter of grain size 10 microns or

less, from the exhaust airstream. The application reflected that there were no controls proposed for CO, NOX, VOCs, SO2, CO2, or HAPs. The application was silent as to control of fine particulates or PM2.5, i.e., particulate matter of grain size 2.5 microns or less.

10. The application contained a site location map based on an aerial map. The proposed location of the facility was on a parcel adjacent to the Arlington Ridge community's golf course, and further east a road labeled as Arlington Ridge Boulevard. Other roads, in what appeared to be a not fully built-out subdivision, were White Plains Way and Manassas Drive. The facility plot plan in the application located the wood drip dryer, rotary kiln, cyclone dust separator and exhaust stack on the eastern end of the parcel closest to the boundary with the Arlington Ridge community's golf course.

11. On April 4, 2014, the Department issued minor source air construction permit 0694866-001-AC (001 Permit). The 001 Permit established a visible emissions (VE) limit of five percent opacity, which is the limit specified under the materials handling rules. Like all air permits issued under the Department's rules, the 001 Permit was also subject to certain general conditions. These included the prohibition against "objectionable odor" as defined in the Department's air pollution rules.

12. At the time the 001 Permit was issued, neither GI Shavings nor the Department recognized that the rules for carbonaceous fuel burning equipment were applicable to GI Shavings and that there should also have been a limit for PM in the 001 Permit. Instead, the rules for a materials handling operation were applied to the facility, which required a VE limit of five percent opacity.

13. The 001 Permit required GI Shavings to demonstrate initial compliance and apply for an operating permit no later than 60 days before it expired on June 30, 2015. On December 18, 2014, the Department issued an amendment of the 001 Permit to grant a transfer of ownership from Quality Shavings of South Florida, LLC, to GI Shavings (002 Permit).

14. On May 11, 2015, GI Shavings submitted a request for additional time to demonstrate initial compliance. The reason given for the request was that operations had not started because GI Shavings was waiting on a certificate of occupancy from Lake County, which was expected within the next 60 days.

15. On May 28, 2015, DEP granted the request and issued a permit amendment (003 Permit), which extended the expiration date from June 30, 2015, to December 31, 2015.

16. On November 24, 2015, GI Shavings submitted a second request for additional time to demonstrate initial compliance. The reason given for the request was coding issues at the new

warehouse. The request noted that "[a]ll the equipment has been up and runs."

17. On December 7, 2015, the Department granted the request and issued a permit extension (004 Permit), which extended the expiration date from December 30, 2015, to June 30, 2016.

18. In the 004 Permit extension, the Department reminded GI Shavings that there must be notification to the Department within five days of commencing operations, compliance testing within 30 days of commencing operations, 15 days notification to the Department prior to compliance testing, and application for an initial air operation permit no later than 60 days prior to the new expiration date.

19. On April 27, 2016, GI Shavings submitted a third request for additional time to demonstrate initial compliance. There was not any reason given for this 120-day extension request. On May 11, 2016, the Department granted the request and extended the permit's expiration date to October 31, 2016 (005 Permit). The Department reiterated the same reminders as in the 004 Permit extension.

20. On October 24, 2016, the Department conducted its first formal site inspection of GI Shavings in response to complaints from Arlington Ridge residents about smoke, airborne PM, and odor. The Inspection Report confirmed it was a complaint inspection. The Inspection Report also stated that the

Department's permitting engineer, Jeff Rustin, had made a previous site visit at which time he had requested to review facility records.

21. The inspection revealed that GI Shavings had commenced operations without notifying the Department, and had not scheduled or submitted a VE compliance test to demonstrate compliance with the permit's five percent opacity limit.

22. During the site inspection, Jeff Rustin and his supervisor, Tom Lubozynski, also a professional engineer, noted that GI Shavings was emitting white smoke from the exhaust stack that did not dissipate quickly and that the smoke may have both moisture and particulates. As they stood 60 feet from the burner and the burner's smoke stack, there was the odor of burning smoke, and particles fell onto Mr. Lubozynski's notepad.

23. Based on their observations, the Department's engineers concluded that the cyclone dust separator was not adequately controlling PM emissions, that the method of operations was unlikely to keep emissions below the five percent opacity VE limitation, and that the equipment should not be operated, except for test purposes.

24. On October 26, 2016, GI Shavings submitted a fourth request for additional time to demonstrate initial compliance. The request was for a 180-day extension with no reason given for the request. On November 23, 2016, the Department granted the

request and extended the expiration date from October 31, 2016, to April 4, 2017 (006 Permit). The Department specifically stated in the 006 Permit that the facility was not authorized for normal operations and suggested the alternatives of adding another pollution control device in the form of a bag house, or replacing the cyclone dust separator.

25. Despite the Department's limitations on operations stated in writing at the times of issuing the 004 and 005 Permit extensions, the credible and persuasive evidence was that GI Shavings operated throughout 2016 up until it hired Bruno Ferraro in late November 2016.

Actions Taken Before Rerating the Burner

26. Mr. Ferraro is the president of Grove Scientific and Engineering Company, and an expert in air emissions, combustion and visible emissions testing, and air permitting. Mr. Ferraro contacted the Department in early December 2016, stating that he was hired by GI Shavings to evaluate emissions and hoped to visit the facility that month. He requested the original emissions calculations and was provided the original air construction permit application, which contained that information.

27. On December 22, 2016, Mr. Ferraro provided to the Department a report of his initial investigation of the GI Shavings facility. He conducted a site visit on December 20, 2016, accompanied by three representatives from the Department

that included Jeff Rustin, Brianna Gowan, and Wanda Parker-Garvin. Ms. Parker-Garvin was the environmental manager for the Central District Office's compliance assurance program. Of particular relevance in the report was the following statement:

> The cyclone works as designed by separating the dry wood shavings and sawdust from the hot combustion air. However, the cyclone is not designed to remove fine particulates from the combustion of wood. The particulate matter (PM) emitted from the combustion of wood is unburned carbon and too small a particle size to be removed by the cyclone. This carbonaceous PM is best controlled by increasing the efficiency of combustion or through the use of post combustion control equipment. (Emphasis added).

J. Ex. 1 at DEP 1-360.

28. Mr. Ferraro recommended certain actions to increase the efficiency of combustion, such as changing the starter fuel to wood logs and varying the sawdust feed rate. He also recommended that GI Shavings seek a permit modification to allow excess emissions during startup, shutdown, and malfunction. He also recommended seeking a permit modification to allow a higher VE limit, such as 20 percent opacity, for normal operating conditions.

29. He recommended, as a last resort, the use of post combustion control equipment. This would involve the installation of a bag house, which he described as a "very costly

alternative and an excessive measure for controlling carbonaceous PM from the combustion of clean wood."

30. The Department responded to Mr. Ferraro's report on January 5, 2017. Ms. Parker-Garvin provided the Department's comments and response in a lengthy email that also approved a two-week experimental testing phase. The email specifically limited opacity to no more than 20 percent for a smoke plume that would be carried by a west wind in an easterly direction toward the adjacent residents and golf course in a 90-degree quadrant designated on an aerial map as the area of concern or "AOC." The email summarized an expectation that a future air operation permit would require a showing of reasonable assurance that the relevant carbonaceous fuel burning rules for a 30 mmBtu/hr burner could be met. This would include a VE limit of 30 percent opacity and a PM limit of 0.2 pounds per mmBtu of heat input of carbonaceous fuel. Both limitations would need to be initially demonstrated before an air operation permit could be issued.

31. On January 8, 2017, Mr. Ferraro provided a draft startup, shutdown, and malfunction operation plan (SSMOP) to the Department. In his email, Mr. Ferraro stated that the facility would start the two-week experimental testing phase the next day, on January 9, and keep the Department updated. He also stated that they would submit an application to modify the air construction permit.

32. On January 17, 2019, GI Shavings applied for a permit modification, specifying only a change in VE limit from five percent opacity to 30 percent opacity. On March 8, 2017, the Department met with Mr. Ferraro, and an attorney for GI Shavings who attended by telephone. The meeting summary documented a discussion of issues that included requirements for annual PM testing, annual VE testing, and the SSMOP's restrictions on hours of operation and wind direction. The Department's response referred to "health concerns of the complainants," "adverse impacts off property," "numerous complaints," and "proximity to a retirement-age community" as reasons for the SSMOP's restrictions.

33. On March 31, 2017, the Department's intent to modify GI Shavings' air construction permit was published. Arlington Ridge residents made verbal comments and filed complaints with the Central District Office regarding the draft air construction permit. The residents also filed a petition for administrative hearing that was eventually resolved in some manner, because the evidence showed that the final permit was issued on June 26, 2017.

34. On June 26, 2017, the Department modified the air construction permit (007 Permit). The 007 Permit authorized a change in the VE limit, added a PM limit, added a SSMOP, added initial compliance requirements, and extended the expiration date

to November 30, 2017. The 007 Permit also included a separate hours of operation agreement (HOA) between the Department and GI Shavings. The HOA initially provided for "[t]wo consecutive 8-hour shifts per day, between the hours of 6:00am and 10:00pm, Sunday thru Friday." These hours could be increased based on lack of compliance issues and lack of complaints over a 90-day period after the 007 Permit was issued.

35. Mr. Ferraro testified that one of the permit requirements was to do a PM compliance test using EPA Method 5. This involved establishing a protocol that would be approved by the Department prior to conducting the compliance test. He testified that during June and July of 2017, the facility started having operational problems that made it difficult to calibrate the fuel feed system to establish the maximum fuel rate and the maximum shavings production rate. During calibration, the sawdust feed system motor kept burning out. Finally, he was able to schedule and conduct the PM compliance test on August 25, 2017.

36. Mr. Ferraro testified that he ran the burner at maximum capacity during the test, which turned out to be an average of 18.252 mmBtu/hr. That is when he observed that this burner's maximum capacity was not 30 mmBtu/hr. The facility failed the PM compliance test with a three-run average PM of 0.531 pounds per mmBtu of heat input of carbonaceous fuel. The facility complied

with the VE limit using the EPA Method 9 test, with the highest six-minute average of 13.33 percent opacity.

37. The compliance test results were reported to the Department on September 8, 2017. In his report, Mr. Ferraro concluded "[i]t is our opinion that the PM caused by the burning of carbonaceous fuel, plus the process emission from the wood shavings dust combined in the method 5 sample filter to cause the observed PM emission rate." He stated that GI Shavings wanted to resolve the situation by exploring a change to the PM limit in the permit.

38. Mr. Ferraro testified that there continued to be startup and operational difficulties at the facility. At maximum operation, the facility was not able to get the burner to the specified heat output of 30 mmBtu/hr. After multiple calibrations and tests, the facility was still unable to function as originally specified by the manufacturer.

39. After consulting with the Department, Mr. Ferraro designed a demonstration test in which the sawdust fuel was fed into the burner without the drying of wood shavings. The demonstration test's purpose was to address the PM and VE from the combustion of sawdust. The test was conducted on October 11, 2017, and reported to the Department on October 30, 2017. The facility failed the PM test with a three-run average PM of 0.824 pounds per mmBtu of heat input of carbonaceous fuel. The

facility complied with the VE limit using the EPA Method 9 test, with the highest six-minute average of 5.6 percent opacity.

40. Mr. Ferraro concluded that the October test confirmed the PM measured was a result of unburned carbon or incomplete combustion of the carbonaceous fuel, i.e., sawdust. He stated that the cyclone dust separator appears to do a good job of removing all large PM. However, the burner was not designed for complete combustion, i.e., did not burn hot enough for long enough. This resulted in the black soot deposited on the method 5 filters during the compliance tests.

41. Meanwhile, on October 10, 2017, Mr. Ferraro forwarded an email to the Department with a request from GI Shavings to increase its hours of operation since it was "commencing our six months busy season," and was negotiating with additional clients. After receiving the initial October 10, 2017, test results from Mr. Ferraro, the Department's permitting program administrator at the time, Kimberly Rush, responded that "[b]ased upon the requirements outlined in the [HOA], the Department cannot approve the request[ed] hours of operation change at this time due to the pending compliance test and the complaint received on 8/16/17."

42. Mr. Ferraro testified that GI Shavings decided to bring in Energy Unlimited Inc., the equipment manufacturer, to commission the facility. At this time, GI Shavings, through Mr. Ferraro, also requested an extension of the air construction

permit that was set to expire in December of 2017. The reason given was that more time was needed to conduct and complete the commissioning process and continue working on facility compliance.

43. On November 20, 2017, the Department extended the expiration date of the air construction permit to November 30, 2018 (008 Permit). The 008 Permit did not make any other changes to the provisions and requirements of the 007 Permit.

44. In January 2018, the manufacturer did significant work to the facility's systems including reworking the fuel feed system, installing a new programmable logic controller and temperature controllers, as well as mechanical and programmatic changes. Upon completion of the commissioning process, Energy Unlimited, Inc., certified and rerated the equipment at a design rate maximum of 26 mmBtu/hr and an actual rate of 21 mmBtu/hr. Mr. Ferraro testified that typical operation was between 15 and 18 mmBtu/hr depending on the temperature outside and the amount of moisture in the air.

Impacts to Arlington Ridge Residents

45. Dennis Hartman lives on Arlington Ridge Boulevard and has been a member of the community association since early 2018. Mr. Hartman testified that GI Shavings is located on a diagonal from his home adjacent to the 11th fairway of the golf course. He testified that the smoke and smell from GI Shavings

irritates his lungs, throat, and nasal passages. Mr. Hartman testified that he is impacted by the facility, in this manner, at least twice a week. Notably, he does not experience these impacts when he is away from Arlington Ridge.

46. James Piersall has been a member of the community association since July 6, 2018, when he closed on his home in Arlington Ridge. Mr. Piersall testified that on November 27, 2018, while playing golf on the 11th hole, a dark blue wave of smoke came across and covered the green. The smell was prevalent, which he equated to burning wood. Mr. Piersall captured the smoke on video with his cell phone. He testified that it was common knowledge that GI Shavings was located on the other side of the 11th hole. The 150-yard marker and a cell tower serve as landmarks that help the residents locate the GI Shavings facility. Mr. Piersall also testified that this was the time of year to open the windows and doors, and let the breeze blow through the house. However, it was not possible to do so, as there was "sediment and soot that comes out on the patio."

47. Rhonda Lugo has lived in Arlington Ridge since August of 2014, and has been a member of the community association. She testified that GI Shavings began operating two years after she moved to Arlington Ridge. She lives on Arlington Ridge Boulevard, where her home is directly behind GI Shavings and her backyard is approximately 300 yards from the facility. Ms. Lugo

testified that her first two years in her home were great. She used her lanai and enjoyed her home. She now describes her home as "unlivable." She does not open any doors or windows, and has not used the lanai for almost two years. The soot and ash covers her lanai furniture. She testified that her eyes burn, and described the odor as more than "just a wood burning smell."

48. Ms. Lugo testified that over the last two years, the residents as a group, have gone to the City of Leesburg and to Lake County, have written senators and state representatives, and have contacted the Department many times.

49. Cheryl Thomack has lived on Arlington Ridge Boulevard since August 2017, and has been a member of the community association. She experiences headaches and breathing difficulties, and uses an inhaler, which she attributes to smoke and soot from the GI Shavings facility. She testified that she went on vacation for a week away from her home and did not experience any headaches or breathing problems while away from Arlington Ridge. She also testified that the GI Shavings facility has operated when the wind is blowing in the direction of the community.

50. Michael Becker has lived on Manassas Drive in the Arlington Ridge community since August 4, 2017. Mr. Becker enjoys the outdoor activities at the Arlington Ridge community and is a member of the softball team. He testified that the

operations of the GI Shavings facility are disruptive to himself and his wife, and that they stay indoors with all windows and doors closed. He testified that they only enjoy their lanai in the late hours of the night, when GI Shavings is not operating. He described the smoke fumes as "pretty toxic" when the wind is blowing their way, with a scorched wood type of smell.

51. Mr. Becker testified that he and his wife have taken several videos of dark smoke billowing from the GI Shavings facility, and provided them to the community association representatives. Mr. Becker also testified that he was aware of the location of at least two industrial facilities near the Arlington Ridge subdivision. He testified that Covanta, a clean waste facility, was located outside the subdivision's gate, and, what he believed was a cement plant, was located off Rogers Industrial Park Road.

52. Douglas Deforge has lived on Manassas Drive since December 2017. He testified that when he first moved in, there was "a lot of noise and I saw a lot of smoke coming out of the trees that are behind us." Eventually, he figured out that it was the location of the GI Shavings facility. Mr. Deforge testified that his wife likes to go out on the lanai to drink her coffee and read the paper, but she is not able to do so on certain days when the machinery is running. Particles on the lanai have to be removed frequently. Mr. Deforge testified that

the smoke has a pungent odor like a paper mill. He expressed concern that he may eventually have respiratory issues because of the particles he inhales when out on his lanai. Mr. Deforge testified that since late November 2018, up until the morning of the final hearing, "[i]t seems more frequently that I'm seeing plumes coming out of GI Shavings."

53. Sherry O'Brien lives on Arlington Ridge Boulevard and has been a member of the community association since October 2014. The GI Shavings facility is directly behind her home across the 11th fairway of the golf course. She has even walked the fence line at the 11th fairway to locate GI Shavings' smoke stack. Ms. O'Brien testified that the dark smoke and odor from the GI Shavings facility prevents her from enjoying the lanai and from golfing. She experiences a more hoarse and raspy voice and sinus problems. Ms. O'Brien testified that even with the windows closed, inside her home smells like burning wood. She testified that she observed the smoke directly behind the 11th green, which is directly behind her home. In her testimony, Ms. O'Brien distinguished between the location of smoke from the GI Shavings facility and the Covanta facility.

54. Robert Salzman has been at Arlington Ridge for several years, four to five days per week, 10 to 12 hours per day. He is involved with the day-to-day activities of the sales office, community association management; and he is on the architectural

control committee. He testified that GI Shavings' operations impact the 11th and 12th holes of the golf course, which is still owned by the Declarant. Mr. Salzman testified that resident complaints about GI Shavings have increased over the years, particularly in the months of October and November when the operations increase from five to seven days per week and into the night. He testified that while GI Shavings is operating, the residents are not active outdoors, they do not seem to leave their homes, and golfers skip the 11th and 12th holes.

55. Mr. Salzman testified that he was familiar with the industrial facilities around Arlington Ridge. He testified to the locations of an adjacent peat facility, an aggregate company, and the Covanta waste-to-energy facility. He testified that there was not a cement plant nearby, but that it was a concrete mixing company. Mr. Salzman also testified that Covanta has a giant stack that puts out steam, but it is not located in the same direction as the GI Shavings facility.

56. All the residents who testified stated that they get "black stuff" on their lanais when there is smoke coming from GI Shavings. The residents also testified that they cannot open their windows and cannot enjoy their lanais. All the residents believed that an increase in hours of operation and no restriction on wind direction for GI Shavings would negatively impact their quality of life.

Complaints to the Department

57. The preponderance of the competent and substantial evidence showed that the residents lodged complaints with the community association, the Department, and the local governments about GI Shavings' operation for most of 2016, 2017, and 2018. The complaints increased in October of each year when GI Shavings increased operations to meet business demands. The complaints varied from the operations being a nuisance and affecting their quality of life in their retirement community, to genuine concerns for their health and well-being.

58. During the hearing, GI Shavings tried to suggest that its facility was not the source of the smoke seen and videoed by the residents. Although the Arlington Ridge subdivision is adjacent to an industrial park, the residents' description and observation of GI Shavings' location behind the tree line at the 11th hole of the golf course was consistent and was supported by the preponderance of the competent and substantial evidence.

59. Arlington Ridges' expert witness, Mitchell J. Hait, Ph.D., and GI Shavings' expert witness, Mr. Ferraro, both provided similar descriptions of the atmospheric conditions during the summer and winter months. They explained that during the winter months, when the atmospheric conditions are cooler, the plume from the exhaust stack does not dissipate as quickly as

during the warmer summer months. Thus, the plume would tend to remain visible and be carried by the wind.

60. The increase in residents' complaints starting in October of each year could be explained by a combination of the cooler atmospheric conditions and GI Shavings' increased operations to meet business demands. GI Shavings tried to suggest that the plumes were only comprised of steam from the drying process and that PM was removed at 99 percent efficiency by the cyclone dust separator. However, the preponderance of the competent and substantial evidence established that the cyclone dust separator did not remove fine PM identified as "unburned carbon . . . too small a particle size to be removed by the cyclone." In other words, the "black stuff" that the residents found on their lanais, and the odor that irritated their noses, throats, and lungs.

Enforcement and Consent Order

61. Despite overwhelming lay and expert evidence of ongoing objectionable odor violations, the Department sought only to resolve the August and October 2017 PM emission limit exceedances with the proposed Consent Order. Even though both Mr. Ferraro and Ms. Rush agreed that the October 2017 test was not run under normal operating and compliance conditions, the Department decided to label it as a violation in the proposed Consent Order.

62. The proposed Consent Order gave GI Shavings a choice of corrective actions, and did not impose any monetary penalty. The choice given was to either install a pollution control device, such as a bag house, or perform a rerating of the burner. The preponderance of the competent and substantial evidence established that the cyclone dust separator did not remove the fine PM that was the source of the residents' objectionable odor complaints. The adequate and reasonable course of action would be to order GI Shavings to both install a bag house and perform the rerating of the burner. Instead, GI Shavings was allowed to rerate the unit and apply for the associated permit that would remove the requirement of a PM emission limit.

63. Notably, the proposed Consent Order was not finally executed until April 20, 2018, at which time GI Shavings had already rerated the facility, applied for a permit, and received a notice of intent to issue with the draft 009 Permit. These completed actions were even stated in the proposed Consent Order.

64. The Department's expert witness, Ms. Rush, testified that considering the difficulties with the facility's operations at its original specifications, rerating the burner was a viable option for obtaining compliance. However, giving GI Shavings a choice of corrective actions, which allowed it to avoid addressing the objectionable odor complaints, was not an adequate

and reasonable exercise of the Department's enforcement discretion under the facts and circumstances described above.

009 Permit Application

65. On January 31, 2018, Mr. Ferraro, on behalf of GI Shavings, submitted the 009 Permit application to the Department. Mr. Ferraro testified that the purpose of the application was to apply the correct part of the carbonaceous fuel burning equipment rule to the facility. The switch would be from the standards applicable to a 30 mmBtu/hr burner to the standards applicable to a less than 30 mmBtu/hr burner. This switch would entirely remove the PM limit and change the VE limit to 20 percent opacity.

66. Mr. Ferraro testified that the application did not request any other change, and the Department did not request any additional information. The application described its purpose as "to update emission limiting standard for carbonaceous [fuel] burning equipment with a rating of less than 30 mmBtu/hr."

67. The emissions unit control equipment was described as a single cyclone device that "separates wood shavings and sawdust from airstream, but does not control products of combustion." Although the inability of the cyclone dust separator to "control products of combustion" was acknowledged, the application indicated that PM would not be synthetically limited, and that a PM limit would not apply to the facility.

68. The application did not propose a pollutant control device for the continuously acknowledged unburned carbon described as "too small a particle size to be removed by the cyclone." Ms. Rush testified that the only PM expected from the facility was PM10. However, as Mr. Ferraro pointed out in his testimony, actual site specific information and data should be considered whenever it is available, instead of simply relying on what is expected based on the literature from the USEPA.

69. The 009 Permit's notice of intent to issue also stated that "the operational hours agreement has been removed from the permit," although GI Shavings did not apply for any change to the 008 Permit beyond the rule switch. Ms. Rush testified that the HOA was voluntary and the Department did not have the authority to require GI Shavings to incorporate these terms into future permits. However, the HOA continues to be a condition of GI Shavings' current 008 Permit. The Department and GI Shavings did not present any persuasive evidence to show that this condition was now obsolete and should not be carried forward into the 009 Permit.

70. The 009 Application did not request any revision to the current SSMOP. Ms. Rush testified that any minor source air permittee may request to revise its SSMOP at any time. However, such a request would be subject to Department approval as specified in condition A.15. of the draft 009 Permit.

71. Although Dr. Hait testified that the facility should be reviewed as a 30 mmBtu/hr burner, the more persuasive evidence was that the rerating by the manufacturer established a design fire rating of 26 mmBtu/hr and an actual rating of 21 mmBtu/hr. Ms. Rush testified that the draft 009 Permit would contain a feed rate limitation that would restrict the facility to a maximum firing rate of 21 mmBtu/hr. Thus, the carbonaceous fuel equipment burning rule was the most appropriate category for this facility, and it was appropriately regulated as a minor source of air pollution.

72. The preponderance of the competent and substantial evidence proved that GI Shavings did not provide reasonable assurance that the facility would control the cause of the objectionable odor violations, i.e., fine PM identified as "unburned carbon . . . too small a particle size to be removed by the cyclone." In other words, the "black stuff" that the residents had constantly and consistently complained about.

Ultimate Findings

73. The preponderance of the competent and substantial evidence established that the GI Shavings facility emits fine PM or "black soot" into the outdoor atmosphere, which by itself or in combination with other odors, unreasonably interferes with the comfortable use and enjoyment of life or property at the Arlington Ridge community, and which creates a nuisance.

74. The preponderance of the competent and substantial evidence established that the cyclone dust separator did not remove the fine PM that was the source of the residents' objectionable odor complaints. Therefore, it was an unreasonable exercise of enforcement discretion for the Department to not require that GI Shavings directly address the objectionable odor issue.

75. In addition, the utility of entering the proposed Consent Order was diminished by the fact that the October 2017 alleged violation was not an appropriate compliance test. Also, by the fact that the proposed Consent Order was not finally executed until April 20, 2018, at which time GI Shavings had already rerated the facility, applied for a permit, and received a notice of intent to issue with the draft 009 Permit.

76. The preponderance of the competent and substantial evidence proved that GI Shavings did not provide reasonable assurance that the facility would control fine PM, which the evidence established was the source of the residents' objectionable odor complaints.

77. All other contentions that Arlington Ridge raised in this proceeding that were not specifically discussed above have been considered and rejected.

CONCLUSIONS OF LAW

Nature of Proceeding

78. This is a de novo proceeding under section 120.57, Florida Statutes, intended to formulate final agency action, not to review action taken earlier and preliminarily. See § 120.57(1), Florida Statutes.

Standing

79. Arlington Ridge presented competent and credible evidence to show it has substantial interests that could reasonably be affected by the adequacy of the corrective actions in the proposed Consent Order. See M.A.B.E. Properties, Inc. v. Dep't of Envtl. Prot., Case No. 10-2334 (Fla. DOAH Nov. 4, 2010; Fla. DEP Jan. 31, 2011).

80. Arlington Ridge presented competent and credible evidence to show that a substantial number of its members have substantial environmental interests that could reasonably be affected by the draft 009 Permit. Arlington Ridge also presented competent evidence that it was authorized to seek relief on behalf of its members in this type of administrative proceeding. See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011); Palm Beach Cnty. Envtl. Coal. v. Dep't of Envtl. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009).

81. Therefore, Arlington Ridge has standing to challenge both proposed agency actions at issue in this proceeding.

Burden of Proof

82. Arlington Ridge challenged issuance of an air construction permit issued under chapter 403, Florida Statutes, and applicable air pollution rules. Therefore, section 120.569(2)(p) governs this proceeding. Under this provision, the permit applicant must present a prima facie case demonstrating entitlement to the permit. Thereafter, the nonapplicant third party has the burden "of ultimate persuasion" and the burden "of going forward to prove the case in opposition to the . . . permit." If the third party fails to carry its burden, the applicant prevails by virtue of its prima facie case.

Permitting Standard

83. Issuance of the 009 Permit depends on reasonable assurance that the GI Shavings facility will meet applicable statutory and regulatory standards. Reasonable assurance means "a substantial likelihood that the project will be successfully implemented." See Metro. Dade Cnty. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Reasonable assurance does not require absolute guarantees that the applicable conditions for issuance of a permit will never be violated.

84. GI Shavings did present a prima facie case of entitlement to the permit. Therefore, the burden of ultimate

persuasion was on Arlington Ridge to prove its case in opposition to the permit by a preponderance of the competent and substantial evidence. Arlington Ridge carried its burden and overcame GI Shavings' prima facie case. See Washington Cnty. v. Bay Cnty. & NW Fla. Water Mgmt. Dist., Case Nos. 10-2983, 10-2984, 10-10100 (Fla. DOAH July 26, 2012; Fla. NWFWMD Sep. 27, 2012).

85. The GI Shavings facility is subject to the permitting requirements for stationary sources under Florida Administrative Code Rules 62-210.300 and 62-212.300. GI Shavings shall provide the Department with the information necessary "to allow the Department to determine whether construction or modification of the emissions unit would result in violations of any applicable provisions of Chapter 403, Florida Statutes, or Department air pollution rules." Fla. Admin. Code R. 62-212.300(3)(a). The Department shall include conditions in each permit issued to insure that the provisions of rule 62-212.300 are not violated. See Fla. Admin. Code R. 62-212.300(3)(c).

86. The facility is not subject to the general PM emission limiting standards in rule 62-296.320. The facility is subject to the specific emission limitations for carbonaceous fuel burning equipment under rule 62-296.410(2)(a).

87. The general pollutant emission limiting standards in rule 62-296.320, and in all air permits, includes a prohibition against objectionable odor. "Odor" is defined as a "sensation

resulting from stimulation of the human olfactory organ." Fla. Admin. Code R. 62-210.200(178). The preponderance of the competent and substantial evidence established that the residents of Arlington Ridge experienced odor in the outdoor atmosphere as defined in this rule.

88. "Objectionable Odor" is defined as "[a]ny odor present in the outdoor atmosphere which by itself or in combination with other odors, is or may be harmful or injurious to human health or welfare, which unreasonably interferes with the comfortable use and enjoyment of life or property, or which creates a nuisance." Fla. Admin. Code R. 62-210.200(177). The preponderance of the competent and substantial evidence established that the residents of Arlington Ridge experienced objectionable odor as defined in this rule.

89. A nuisance is defined as an unreasonable interference with another's use or enjoyment of property. The test for an actionable nuisance is the rule of reasonableness of the use complained of under the circumstances. See Lee v. Fla. Pub. Util. Comm'n, 145 So. 2d 299, 301-302 (Fla. 1st DCA 1962).

90. The test to be applied is of the effect of the offending conditions on "an ordinary, reasonable man with a reasonable disposition and ordinary health and possessing the average and normal sensibilities." Nitram Chems. Inc. v. Parker, 200 So. 2d 220, 231 (Fla. 2d DCA 1967).

91. A party pleading nuisance must also establish that the use complained of is the actual, proximate cause of the injury. "[T]estimony consisting of guesses, conjectures or speculation" is not sufficient. See Durrance v. Sanders, 329 So. 2d 26, 29-30 (Fla. 1st DCA 1976), cert. den., 339 So. 2d 1171 (Fla. 1976). The preponderance of the competent and substantial evidence presented by Arlington Ridge proved that the GI Shavings facility is the actual, proximate cause of the objectionable odor that unreasonably interferes with the use and enjoyment of their property.

92. An emission is defined as the "discharge or release into the atmosphere of one or more air pollutants." Fla. Admin. Code R. 62-210.200(93). "No person shall cause, suffer, allow or permit the discharge of air pollutants which cause or contribute to an objectionable odor." Fla. Admin. Code R. 62-296.320(2). The preponderance of the competent and substantial evidence proved that the GI Shavings facility emits air pollutants which cause or contribute to an objectionable odor.

93. Therefore, GI Shavings did not provide reasonable assurance that the construction or modification of its emissions unit would not result in violations of applicable provisions of Chapter 403 and Department air pollution rules. See Fla. Admin. Code R. 62-4.070 and 62-212.300(3)(a).

Proposed Consent Order

94. There are two types of consent orders. The first type is a license or permit substitute that serves "as authorization for a permittable type of activity that has not yet been conducted or is ongoing." Sarasota Cnty. v. Dep't of Envtl. Reg. & Falconer, 9 F.A.L.R. 1822, 1823 (1986). The second type is a resolution of environmental violations that is designed to bring a violator back into compliance with the law. See Williams v. Moeller & Dep't of Envtl. Reg., 8 F.A.L.R. 5537, 5541 (1986). The proposed Consent Order in this proceeding was of the second type.

95. The Department has the burden of proving that a consent order constituted a reasonable exercise of the Department's enforcement discretion under the circumstances. See M.A.B.E. Properties, Case No. 10-2334, FO at 3. The more persuasive evidence adduced at the final hearing established that the terms of the proposed Consent Order were not a reasonable exercise of the Department's enforcement discretion under the circumstances. Id.

96. The preponderance of the evidence showed that the corrective measures outlined in the proposed Consent Order were not reasonable considering the applicable rules, the violations actually addressed, and the facts adduced in this de novo hearing.

97. Since the corrective actions were not reasonable, the Department also abused its enforcement discretion when it did not require a penalty sufficiently large enough to ensure future compliance. Id.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department enter a final order denying GI Shavings' application for minor source air construction permit 0694866-009-AC, and disapproving Consent Order OGC No. 18-0077.

DONE AND ENTERED this 19th day of June, 2019, in Tallahassee, Leon County, Florida.

FRANCINE M. FFOLKES
Administrative Law Judge
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.