Department of Environmental Protection

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August 12, 1997

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Re: Petition for Declaratory Statement
Piney Point Phosphates, Inc.

Dear Sirs:

Attached is the Final Order on Petition for Declaratory Statement on behalf of Piney Point Phosphates, Inc.

If you have any questions regarding this matter, please contact me at 488-9730.

Sincerely,

Jack Chisolm
Deputy General Counsel

JC/lr

Enclosure

cc: Howard Rhodes
David Dee, Esq.

8/12 FAXED TO: Bob Stewart Mulberry Phosphates
Bill Thomas
Rick Garrity
8/12 xc: Claire
ALC
Bill T.

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN RE: Petition for Declaratory Statement;
PINEY POINT PHOSPHATES, INC. OGC Case No.: 97-0880

FINAL ORDER ON PETITION FOR DECLARATORY STATEMENT

On May 14, 1997, Piney Point Phosphates, Inc. (Petitioner), filed a Petition for Declaratory Statement with the Department of Environmental Protection (Department), under Section 120.565, Florida Statutes (F.S.), and Rule 62-103.510, Florida Administrative Code (F.A.C.). See, Exhibit 1. The petition raises questions regarding the applicability of several air permitting rules to Petitioner's sulfuric acid plant (plant), which is a component of Petitioner's phosphate fertilizer manufacturing facility.

The issues presented by Petitioner for consideration by the Department are as follows:

1. Whether the proposed work to Petitioner's sulfuric acid plant constitutes either "reconstruction," "modification," or a "major modification," or whether the plant has otherwise been "shut down?"

2. Whether proposed work to Petitioner's sulfuric acid plant would require any air permits in addition to Petitioner's currently held permit (No. A041-197112), which requires compliance with New Source Performance Standards (NSPS)?

3. Whether the sulfuric acid plant, as currently permitted by the Department, is in compliance with NSPS requirements for sulfuric acid plants?

PRELIMINARY STATEMENT

Section 120.565(1), F.S., allows any substantially affected person to seek a declaratory statement regarding "the agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances." Declaratory statements are not available to all petitioners or all requests. Both the petitioner and the petition must meet certain minimum requirements before an agency can consider the issues raised in the petition. Sarasota County v. Department of Administration, 350 So.2d 802 (Fla. 2d DCA 1977). The agency is also guided by comparable law under Florida's declaratory judgment statute. As stated in Couch v. State, 377 So.2d 32, 33 (Fla. 1st DCA 1979):

> [o]wing to the similarity of declaratory statement proceedings under the Administrative Procedures Act and declaratory judgments under Chapter 86, Florida Statutes, we are of the opinion that in determining the availability and scope of the remedies under the former, we may be guided by decisions under the declaratory judgments statute.

As discussed below, petitions for declaratory statements must be dismissed by an agency if the agency does not have jurisdiction over the matter at issue for failure to present an actual controversy, or if the petition seeks a declaration of general applicability. An agency must also dismiss a petition for a declaratory statement if it does not have jurisdiction to interpret how a particular rule or order would apply to a petitioner. Declaratory statements, like declaratory judgments, cannot be rendered when the issues in the petition involve only the mere possibility of a dispute in the future, or when the petition requests an advisory opinion. An agency lacks jurisdiction to render a declaratory statement unless the petitioner demonstrates a "bona fide,

actual, present and practical need for a declaration." Okaloosa Island Leaseholders Assoc., Inc., v. Okaloosa Island Authority, 308 So.2d 120, 122 (Fla. 1st DCA 1975). See also, Martinez v. Scanlan, 582 So.2d 1167, 1170 (Fla. 1991).

Furthermore, a preliminary test of substantial interests must be met by the petitioner before a petition may be considered. If the petitioner has no substantial interests which would be affected by the requested declaration, then the agency cannot issue the declaration and the petition must be denied. In Manasota-88, Inc., v. Gardinier, Inc., 481 So.2d 948 (Fla. 1st DCA 1986), the petitioner, Manasota-88, sought a declaration from this agency on the applicability of air pollution permits to the phosphate industry, in general, and to Gardinier, Inc., in particular. Both petitions were denied, and the denial was upheld on appeal on the grounds that the requested declaration did not affect the petitioner's substantial interests.

Standing under section 120.565 of the Florida Statutes is limited to declaratory statements which apply to the petitioner in its particular set of circumstances only. If the petitioner has no substantial interests which would be affected by the requested declaration, then the agency cannot issue the declaration and the petition must be denied. Manasota-88, at 949-50. Furthermore, requested declarations of general applicability cannot be answered by an agency. If the requested declaration carries implications for others statewide, declaratory statement proceedings are inappropriate even though the declaration would have a direct impact on the petitioner. Mental Health District Board, II-B v. Florida Department of Health and Rehabilitative Services, 425 So.2d 160 (Fla. 1st DCA 1983). Declaratory statements of general applicability would be rules, as defined by section 120.52 of the Florida Statutes. These rules would be subject to invalidation for failure of the agency to comply with the requirements of

section 120.54 of the Florida Statutes in the promulgation of the rule. Price Wise Buying Group v. Nuzum, 343 So.2d 115 (Fla. 1st DCA 1977).

Applying these principles of law to the Statement of Facts set forth below, the Department finds that it has jurisdiction over the requested interpretation contained in Issues 1 and 2 identified above, and that the petitioner has standing to request such an interpretation, since the declaratory statement applies to the petitioner in its particular set of circumstances only and presents an actual controversy. The Department also finds that insufficient information was provided to allow an interpretation as to Issue 3.

STATEMENT OF FACTS

The following facts, as set forth in the petition and its attachments, are the only facts considered in deciding the issues. The Department takes no position with regard to the truth or accuracy of these facts, but merely accepts them as presented by Petitioner for the purpose of this Final Order.

1. Petitioner, Piney Point Phosphates, Inc., located at 13300 U.S. Highway 41 North, Palmetto, Florida, is a phosphate fertilizer manufacturing facility that includes a Monsanto double-absorption sulfuric acid plant.

2. This sulfuric acid plant currently holds an air operation permit, No. A041-197112, which requires the plant to comply with NSPS for sulfuric acid plants, as set forth in Rule 62-296.402, F.A.C.

3. The sulfuric acid plant was constructed to its present configuration in the mid 1970s .

4. The plant was fully operable when it temporarily ceased operations in June, 1992, because of market conditions.

5. At no time has Piney Point management intended that the plant be permanently shut down.

6. The Department has maintained the air pollutant emissions from the plant in the Department's Emissions Inventory. Consequently, those emissions are presumed by the Department to be occurring, and the ground level ambient air concentrations resulting from those emissions are considered by the Department when analyzing air quality impacts and increment consumption from other emissions units seeking permits to construct air pollution sources.

7. In 1996, Piney Point management decided to resume operations at the plant.

8. The plan to restart the plant required the repair and replacement of certain plant components.

9. The restarted plant would have the same capacity, design basis, and physical configuration, as previously permitted, and there would be no change in the pollutants emitted.

10. Piney Point management states that the scope of work will cost approximately 16.9 million dollars.

11. Letters to the Department from Robert C. Stewart, Senior Vice President of Piney Point, dated March 5, and March 26, 1997, describe the proposed work.

12. The construction of a new plant at Piney Point Phospates, Inc., with a 2000 tons per day capacity, having a double contact wet process design, and emission limitations as of December 13, 1996, will cost in excess of $40 million (as stated in attachment identified by

Petitioner as "Exhibit 2" to Petitioner's letter to the Department, dated December 17, 1996, contained within Appendix - Tab D).

CONCLUSIONS OF LAW

ISSUE 1

Whether the proposed work to Petitioner's sulfuric acid plant constitutes either "reconstruction," "modification," or a "major modification," or whether the plant has otherwise been "shut down?"

The Department finds that the proposed work by Piney Point is not a "reconstruction" as defined in Rule 62-210.200(240), F.A.C. Accepting Petitioner's "Statement of Fact 12," the proposed expenditure of $16,900,000 represents less than half of the fixed capital cost that would be required to build a new facility (2000 tons per day sulfuric acid plant). Thus, an expenditure of $16,900,000 would not meet the definition of "reconstruction."

Regarding the issues of "modification" and "major modification," the Department finds as follows. The Department does not consider the overall scope of the project as described in Petitioner's letter to the Department dated December 17, 1996 (Appendix - Tab D, with attachment identified by Petitioner as "Exhibit 1"), including the replacement of certain components of the sulfuric acid plant, to be routine maintenance. For example, the Department does not consider the replacement of all three acid towers as routine. Also, any replacements involving redesign, such as the acid coolers, the economizer, and the instrumentation, would not be considered as routine maintenance. Since the plant was erected over thirty years ago (based on Robert C. Stewart's statement in his letter of March 26, 1997, to the Department), and was near the end of its useful life when it was shut down in June of 1992, such major replacements

must be viewed as life extension items and, therefore, not routine maintenance. Thus, the project is not exempt under Title 40 of the Code of Federal Regulations (CFR), Part 60 (40 CFR 60.14), from the definition of "modification" under 40 CFR 60.2 as routine maintenance, repair, or replacement of component parts of an emissions unit. The project is also not exempt from the definition of "modification" per Rule 62-210.200(187)(a)1.a., F.A.C., for the same reasons as cited above.

Per Section 13 of Piney Point's request for a Declaratory Statement, "[t]he plan to restart the plant, scheduled for late 1997, *required* the repair and replacement of certain plant components. *Following that work*, the restarted plant would have the same capacity, design basis and physical configuration as previously permitted . . . ." (emphasis supplied). The Department concludes that without the described work, the restarted plant (if it could be restarted) would be incapable of achieving an hourly production rate of 83.3 tons per hour (TPH) corresponding to the projected 2000 tons per day (TPD) permitted capacity. The resulting physical changes at the plant, coupled with operation at the projected production limit versus the presently achievable production rates, will increase the actual hourly rate of sulfur dioxide and sulfuric acid mist emissions. Since the project is not exempt from the definition of "modification" mentioned above, this meets the definitions of "modification" under 40 CFR 60.2 and Rule 62-210.200(187)(a), F.A.C. As stated in "Statement of Fact 9," Petitioner declared that there would be "no change in the pollutants emitted." Based on the Department's assessment of the proposed project, the Department interprets Petitioner's statement to indicate that there would be no change in the *type* of pollutants emitted, since the Department concludes that there would be a change in the *rate* and *amount* of emissions.

This sulfuric acid plant is a major facility under Rule 62-212.400(2)(d)2.b., F.A.C., since it has the potential to emit at least 100 tons per year (TPY) of the criteria pollutant, sulfur dioxide. Furthermore, it is expected that actual emissions of sulfur dioxide will increase by well over the significant emission rate of 40 TPY, as identified in Table 212.400-2, Regulated Air Pollutants - Significant Emissions Rates, F.A.C. This expectation is based on the production rate of 2,000 tons of sulfuric acid per day, given in the above-referenced letter of December 17, 1996, which equates to 730,000 TPY. The sulfur dioxide emissions rate allowed by "Specific Condition 3" of the existing permit, No. AO41-197112 (submitted as Appendix - Tab A), is 4 pounds of sulfur dioxide per ton of acid produced. Using this emissions rate and the projected annual production, the plant would emit 2,920,000 pounds (1460 tons) of sulfur dioxide per year. "Specific Condition 8" of the same permit allows a production rate of only 53.7 TPH of sulfuric acid, which equates to 470,000 TPY. Applying the 4 pounds of sulfur dioxide per ton of acid rate, present annual emissions of sulfur dioxide are limited to 940 TPY. The difference in sulfur dioxide emissions, based on Piney Point's presently permitted and future projected operating rates, is 520 TPY, which is obviously greater than 40 TPY. A value in the same order of magnitude as this 520 TPY difference would also result if past *actual* emissions data had been submitted by Piney Point to compare with future projected emissions.[1] Similar analyses show that actual emissions of sulfuric acid mist would increase by more than the significant emission rate of 7 TPY, as identified in Table 212.400-2, F.A.C.

[1]According to an application submitted by Piney Point's former owner, Royster, past actual emissions were 906 TPY of sulfur dioxide and 23.9 TPY of sulfuric acid mist. Potential emissions after the plant resumes operations following the proposed changes would be 1460 TPY of sulfur dioxide and 55 TPY sulfuric acid mist. Thus, the increases would be 554 TPY and 31 TPY for these two pollutants.

The estimated annual emissions increases represent "significant net emissions increases," as described in Rule 62-212.400 (2)(e)2., F.A.C., per Table 212.400-2 in Rule 62-212.400, F.A.C. The project, together with such emissions increases, constitutes a modification to a major facility, per Rule 62-212.400 (2)(d)4.a., F.A.C. The Department does not specifically define the term "major modification" in its rules; however, the foregoing factors also satisfy the conditions for a "major modification," as defined in 40 CFR 52.21(b)(2)(i).

Increases in hourly and annual emissions of sulfur dioxide normally result in increases of hourly and annual ambient concentration of sulfur dioxide. Sulfur dioxide is a pollutant for which national standards have been promulgated under 40 CFR 50.4 - National Primary Ambient Air Quality Standards for Sulfur Oxides (Sulfur Dioxide), and 40 CFR 50.5 - National Secondary Ambient Air Quality Standards for Sulfur Oxides (Sulfur Dioxide). "[A]ny physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated under part 50" of Chapter 40 of the Code of Federal Regulations satisfies the definition of "modification" or "modified source" given in 40 CFR 52.01. This, in turn, fulfills the definition of "modification" given in Rule 62-210.200(187)(b)3., F.A.C.

Per Rule 62-210.300(1), F.A.C., an air construction permit shall be obtained by the owner or operator of any proposed new or modified facility or emissions unit prior to the beginning of construction or modification. As a modification to a major facility, the Preconstruction Review Requirements of Rule 62-212.400(5), F.A.C., and the Best Available Control Technology (BACT) provisions of Rule 62-212.400(6), F.A.C., are applicable to the described project.

Regarding the issue of whether "the plant has not otherwise been 'shut down,'" the Department determines as follows. The Department considers the plant to have shut down, but acknowledges that the 1992 shut down was not intended to be permanent.

ISSUE 2

Whether proposed work to Petitioner's sulfuric acid plant would require any air permits in addition to Petitioner's currently held permit (No. A041-197112) which requires compliance with New Source Performance Standards (NSPS)?

Since the Department has determined that the scope of proposed work described by Petitioner is a modification under Rule 62-210.200(187), F.A.C., a construction permit is required in accordance with Rule 62-210.300(1), F.A.C., and Petitioner must satisfy the preconstruction review requirements as indicated above.

ISSUE 3

Whether the sulfuric acid plant, as currently permitted by the Department, is in compliance with NSPS requirements for sulfuric acid plants?

The Department cannot confirm that the plant is presently in compliance with 40 CFR 60, Subpart H - Standards of Performance for Sulfuric Acid Plants ("NSPS requirements"), adopted by reference in Rule 62-204.800, F.A.C., because it is not operating and cannot operate without "required repairs" and substantial expenditures. Actual operation is required to conduct the necessary compliance inspections and source tests to determine if the plant is in compliance with the applicable NSPS.

THEREFORE, IT IS ORDERED THAT the Petition for Declaratory Statement filed by Piney Point Phosphates, Inc., is determined as stated herein.

NOTICE OF RIGHTS

Any party to this order has the right to seek judicial review of the order under Section 120.68 of the Florida Statutes by filing a notice of appeal under rule 9.110 of the Florida Rules of Appellate Procedure with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, MS 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 order is filed with the clerk of the Department.

DONE AND ORDERED this 12th day of August, 1997, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Virginia B. Wetherell

VIRGINIA B. WETHERELL
Secretary

3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, FL 32399-3000
Telephone: (904) 488-4805

FILING AND ACKNOWLEDGMENT FILED on this date, under section 120.52 of the Florida Statutes, with the designated Department Clerk, who hereby acknowledges receipt of this order.

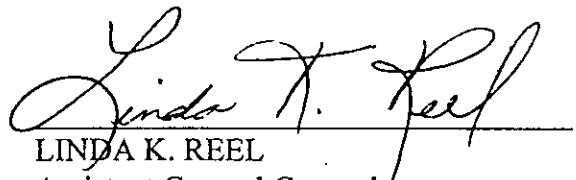
Rebecca Fox
CLERK

8-12-97
DATE

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was mailed to co-counsel for Petitioner: Lawrence N. Curtin, Holland & Knight, 315 South Calhoun Street, Suite 600, Tallahassee, Florida 32301 and Paul H. Amundsen, Amundsen & Moore, 502 East Park Avenue, Tallahassee, Florida, 32301, on this 12th day of August, 1997.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



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