AMUNDSEN & MOORE
ATTORNEYS AT LAW

PAUL H. AMUNDSEN
RICHARD W. MOORE
RICHARD E. TORPY
RODOLFO NUÑEZ
E. PALMER MASON

OF COUNSEL:
BYRON B. MATHEWS, JR.

502 EAST PARK AVENUE
TALLAHASSEE, FLORIDA 32301
(904) 425-2444
FACSIMILE: (904) 425-2447

PLEASE REPLY TO:
POST OFFICE DRAWER 1759
TALLAHASSEE, FLORIDA 32302-1759

BREVARD COUNTY OFFICE
200 S. HARBOR CITY BLVD.
SUITE 203
MELBOURNE, FL 32901
(407) 724-6262
FACSIMILE: (407) 727-2006

February 7, 1997

- Hand Delivery -

Doug Beason, Esquire
Office of General Counsel
Department of Environmental Protection
2600 Blairstone Road
Twin Towers Office Building
Tallahassee, Florida 32399

Re: Piney Point Phosphates, Inc.; Response to January 16, 1997 Correspondence To You On Behalf of Manatee County

Dear Doug:

As you know, this law firm has the pleasure of representing Piney Point Phosphates, Inc. on environmental issues before the Department of Environmental Protection ("DEP"). On Friday, January 17, 1997, the above-captioned letter from counsel for Manatee County was received by this office. The purpose of my letter is to advise you of various inaccuracies and misleading statements contained in Manatee County's letter.

- Introduction -

Initially I feel compelled to emphasize that Piney Point Phosphates, Inc. has made every effort to inform Manatee County of its plans, a fact that is not mentioned in the county's letter. Manatee County was expressly invited to a meeting held at DEP's Tampa office in early December 1996, but Manatee County chose not attend. Nevertheless, in a further effort to fully inform Manatee County, company representatives arranged a meeting with Manatee County's environmental staff to provide details of the company's plans. At that meeting, the county representative declined Piney Point Phosphate, Inc.'s offer to provide those details. Piney Point even offered to make a detailed presentation of its plans to the county commission or, alternatively, to the several commissioners individually. These offers were also declined.

Because of its efforts to be forthcoming and cooperative with Manatee County, Piney Point Phosphates, Inc. is particularly disappointed by the timing and content of the county's letter. The document pieces together a very inaccurate version of the facts when the true facts were so recently declined. These inaccurate facts, in turn, are used as a platform for the county to espouse legal theories which, though skillfully articulated, are either inapplicable or outright wrong.

More fundamentally, Manatee County's letter exhibits a lack of understanding about the background of and operations at the Piney Point fertilizer plant; Florida's phosphate fertilizer industry in general; and how DEP has correctly handled a similar plant restart. We note that DEP's Tampa air permitting staff may be the most knowledgeable regulatory group in existence concerning phosphate fertilizer issues. These individuals are capable of properly evaluating the regulatory consequences arising from Piney Point's plans and activities--when presented with the correct facts. They have done so before.

The DEP staff's evaluation as communicated to Piney Point is presented in DEP's December 17, 1996 letter to Piney Point, of which Manatee County has a copy. Piney Point has, to date, committed or expended upwards of $2 million towards restarting the Piney Point Plant with additional, substantial expenditures ongoing or immediately forthcoming.

The following discussion responds to various assertions by Manatee County. Manatee County's letter is so replete with inaccuracies that the following comments are not necessarily in the same order as presented by Manatee County.

I. Response to Manatee County's Factual Presentation

Although Manatee County presents a lengthy legal analysis, that analysis is driven by Manatee County's version of the facts. The law presented by Manatee County is largely inapplicable. But the principle flaw of Manatee County's letter is its substantial misstatements or misunderstanding of the facts. Generally, these factual problems fall into three categories: First there are facts that are simply wrong--one of the biggest problems with Manatee County's letter. Examples are the "wet" process discussion, the claim that the plant is in general disrepair; and the scope and nature of maintenance and repairs at fertilizer manufacturing plants. These untrue assertions do not suggest dishonesty by Manatee County, but rather a very limited command of the facts at hand.

Second, there are omitted facts, such as the March 1993 "No Name Storm" that damaged the cooling tower; and the fact that the company has regular employees at the plant keeping idle plant components from deteriorating. Again, these facts are either known by or available to Manatee County.

Finally, there are exaggerated or slanted facts. Examples of these are the insinuation throughout the letter that the plant has historically been in poor condition and as a consequence operated at different rates, and ultimately ceased operations for that reason; or the gratuitous "cloud of pollution" discussion. These embellished facts are included as a substitute for analysis so as to unfairly prejudice an audience[1], or to compensate for the lack of other, compelling facts.

A. Plant Ownership

Manatee County states that Piney Point purchased the plant after the bankruptcy of the prior owner, Royster Phosphates, Inc. This statement is incorrect; but the only possible reason that this assertion is contained in Manatee County's letter is to create an impression that the plant stopped operating due to a bankruptcy. Otherwise, it is unclear why this fact would be important to Manatee County.

The plant stopped operating due to market conditions that existed in mid-1992 and not because of the bankruptcy. In any event, the operational and financial history of the plant has no bearing on the capability of the present owner and management to operate the plant in compliance with applicable permit conditions and regulatory requirements.

B. The Piney Point Fertilizer Plant

1. Permit Background

In DEP's December 17, 1996 letter to Piney Point Phosphates, Inc., DEP requested a copy of permit No. AC41-3042B dated September 1, 1975 for the sulfuric acid plant. This construction permit was to modify the sulfuric acid plant with an add-on interstage absorption system. However, a copy of that permit cannot be

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[1] These kinds of misstatements may have been written for a broader audience. The contents of Manatee County's letter were summarized in a Sarasota newspaper only days after it was written.

found. The company has located the successor operation permit, No. AO41-2042B, issued August 5, 1976. This permit discloses that the plant was the subject of various DEP operating permits dating back to 1973.

The sulfuric acid plant has not been modified since 1976 and is of the same configuration as permitted by permit No. AO41-2042B. Currently, the sulfuric acid plant and other emissions units at the facility (i.e., quick lime silo, sulfur storage tank, phosphoric acid plant, production/shipping, auxiliary boiler) are the subject of several DEP permits.

The company filed a timely application for an operating permit under Title V of the Clean Air Act Amendments of 1990.[2]

2. New Source Performance Standards (NSPS)

A substantial portion of Manatee County's letter, including attachments "C" and "D" thereto, consists of a detailed discussion of Piney Point's work, focusing on the applicability of New Source Performance Standards ("NSPS") to the sulfuric acid plant. The gist of this long analysis is that the company's work is "reconstruction," or a "modification" thus triggering NSPS.

Again, Manatee County mistakes the facts and as a consequence misapplies the law. Piney Point's permit No. AO41-197112, already requires the sulfuric acid plant to comply with New Source Performance Standards ("NSPS"). NSPS will be no less applicable when the sulfuric acid plant is restarted, as DEP well knows. It is unfortunate that Manatee County declined to be briefed when Piney Point offered to do so. Because of Manatee County's lack of command over the facts, much of what it has written is inapplicable.

More importantly, a major concern expressed in Manatee County's letter has been satisfied. The sulfuric acid plant will comply with NSPS.

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[2] Though Manatee County states otherwise, Piney Point Phosphates, Inc. has not abandoned its plans to build a new sulfuric acid plant. The draft permit for the new plant allows operation of the existing plant until completion of the new plant. Work has not begun on the new plant because of administrative litigation brought by Manatee County.

3. Operational Background

The Piney Point plant was in operation until June 1992 when it ceased operating because of market conditions. The plant was fully operable when production stopped. In previous years, plant operations ceased from time-to-time for periodic maintenance or due to market conditions, as is the practice at all such plants. Depending on the nature and scope of the necessary maintenance and repairs, which can be substantial, the sulfuric acid plant can be idle for as long as two or three weeks. Additionally, and also like all other fertilizer manufacturing facilities in Florida and elsewhere, the Piney Point plant has operated at different rates at different times depending on various factors including business and market conditions. Likewise, the sulfuric acid plant has operated at different rates and different times for similar reasons, including the market price of sulfuric acid compared to the cost of producing sulfuric acid.

Thus Manatee County's statement that the plant has operated "sporadically" is misleading, and especially so in light of the fact that the plant was fully operational when production stopped in 1992. Manatee County would like DEP to believe that the Piney Point plant ceased operations as a consequence of a bankruptcy, or plant disrepair, or a combination of both. That is incorrect.

Manatee County's letter discloses a serious misunderstanding of scheduled maintenance turnarounds in the phosphate fertilizer industry. These turnarounds can, and frequently do, involve substantial work including replacement of plant components at great expense. Such was the case in February 1989--a scheduled maintenance turnaround that Manatee County refers to at least twice in its letter. However, the stated down time of 415 hours on page 4 of Manatee County's letter is not unusual for such plant turnarounds. It is true that plant operations were suspended at that time for routine maintenance, including repair and replacement of components, and the work was substantial. But as DEP is well aware, this is not extraordinary in the industry, but is commonplace.

On March 12 and 13, 1993, the plant's cooling tower was struck by the infamous "No Name Storm." Thus, Manatee County's premise that the plant is inoperable because "Piney Point has intentionally allowed the old, existing plant to deteriorate" is incorrect.[3] Nor is there any relationship, as is implied on the first page and

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[3] Exhibit I to Piney Point Phosphates, Inc.'s letter of 12/17/96 states that the cooling tower was "destroyed in a storm."

elsewhere in Manatee County's letter, between differing annual rates of operation and the upkeep or condition of the plant. Those suggestions appear to have been drafted to give the impression that the plant operated while in disrepair and now sits in a dilapidated state. If that is what Manatee County is attempting to convey in its letter, it is inaccurate and misleading.

Finally, the Piney Point plant has not been allowed to deteriorate over the past five years as Manatee County represents. During this period there have been, and still are, regular employees of Piney Point Phosphates, Inc. who work at that plant every day to keep components in operational condition. Manatee County is obviously unaware of these facts and has thus assumed other facts to serve its own purposes. But for the cooling tower and the completion of routine maintenance, repair, and replacement of component parts, which is in progress and will continue over the next ten months, the Piney Point plant would be operational right now.

C. The So-Called "Cloud of Pollutants" Incident

In an apparent effort to drive home its contentions of poor plant conditions and upkeep, Manatee County has included a gratuitous discussion of a 1989 spill incident. On page 5 of its letter, Manatee County states:

> [I]n 1989, a spill of sulfuric acid created a cloud of airborne pollutants, which compelled Manatee County to evaluate [sic] approximately 400 people from the area near the plant.[4]

Manatee County does not mention that the plant itself was not evacuated and that the spill did not come from the sulfuric acid plant--facts that the county well knows. Indeed, Manatee County presents no evidence, and there is no evidence, that measurable airborne pollutants ever left the plant property as a result of this incident. And most important of all, though not mentioned by Manatee County, no one was injured.

This is not the first time the county has inappropriately raised this incident. To be sure, spills and toxic clouds are very serious. But the county's practice of exaggerating and sensationalizing the 1989 occurrence--and the invocation of images of a toxic cloud without data--is a red herring that depicts my

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[4] In a recent newspaper story summarizing Manatee County's letter, the incident is described as involving a "toxic cloud."

client, the Piney Point plant, and indeed the whole fertilizer industry in a false light. This grandstanding is part of Manatee County's improper attempt to oppose any operation of the Piney Point plant.[5]

D. The Piney Point Plant Is a "Wet Process" Plant

Illustrative of Manatee County's failure to check its facts about the Piney Point plant is the assertion on page 7 of its letter: "It is our understanding that Piney Point's existing plant does not use a "wet" process." This statement appears to be a guess by Manatee County. In any event, it is an attempt to mischaracterize the scope and nature of the company's work and to seriously influence DEP's perception of the regulatory consequence of those activities.

Despite Manatee County's musings to the contrary, the Piney Point plant is a "wet" process plant, as DEP well knows.

E. Piney Point Phosphates, Inc. Has Fully Described Its Current Maintenance and Repair Activities

Piney Point's repair and maintenance plans are detailed in Exhibit I of its December 17, 1996 letter to Mr. W.C. Thomas of the Department's Southwest District Office. Contrary to Manatee County's statements, there is nothing ambiguous about what Piney Point Phosphates, Inc. is doing, although an attempt has been made to exaggerate its scope.

First, Manatee County points out that Piney Point has identified 90 percent of the work, implying that the company is withholding information from the agency. However, it is impossible to predict or guarantee an exact project cost until substantial work has been accomplished. Therefore, 10 percent is considered a contingency. Piney Point Phosphates, Inc. does not believe it would be responsible to describe this work, or the cost of this work, without including a contingency in this manner.

Second, the proposed maintenance and repair on the sulfuric acid plant is estimated to cost $16 million, not $18 million as Manatee County claims in its letter. The $18 million figure used by Manatee County includes the installation of a new sulfur storage tank and auxiliary boiler. The county's imprecise statements about

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[5] The misstatements in Manatee County's letter combined with veiled threats of litigation confirm that Manatee County seeks to stop this plant regardless of the facts or the law.

project costs are illustrative of either its misunderstanding of the Piney Point Phosphates, Inc.'s operations or a failure to closely review documents in its possession.

Third, with the exception of the mist eliminators, the plant components undergoing repair, maintenance, or replacement have no affect on pollutants emitted. Furthermore, with the exception of the cooling tower that was damaged by the 1993 "No Name Storm" these plant components are commonly repaired or replaced in the course of scheduled plant turnarounds, including the work on the mist eliminators.

In summary, Manatee County's premise statement that Piney Point Phosphates, Inc.'s submittals and communications do not adequately address the issues is simply wrong. It is true that the county is seriously misinformed, but DEP certainly has a full and adequate understanding of Piney Point Phosphates, Inc.'s program towards the restart of the plant.

II. Legal Analysis

A. Prior Agency Practice

In evaluating Manatee County's contentions, consideration should be given to how DEP has viewed similar instances involving plant restarts in the phosphate fertilizer industry. Such determinations are more useful than precedents involving other kinds of industries in other states, like iron ore operations in Minnesota or power plants in Wisconsin.[6]

In August 1995, DEP renewed operating permit AO53-246083 to CF Industries, Inc. ("CFI") for the company's Sulfuric Acid Plant No. 6 in Bartow. That plant had been shut down for approximately six years. DEP issued that permit under Rule 17-210.300(2)(c)3., Florida Administrative Code.[7] That rule provides for the renewal of a permit for 10 years for sources shut down for five years or more.

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[6] Indeed, no Florida precedents are discussed by Manatee County on this issue. Exhibit "D" to Manatee County's letter relating to Cyprus Northshore Mining Corporation, Silver Bay, Minnesota, has no applicability here and so states on page 5: "This is not a case where the source is reactivating a shut-down facility and making only "routine" changes to bring it back on line."

[7] Now codified as Rule 62-210.300(2)(c)3., Fla. Admin. Code.

On November 22, 1995, CFI asked DEP to approve the restart operation of its No. 6 sulfuric acid plant. The plant's production rate was to be increased from 960 tons per day to 1440 tons per day. As a part of its plans, which CFI considered to be routine maintenance and repair, CFI proposed to replace the old catalyst with a new catalyst of a different design. CFI explained its plans as follows:

> The new catalyst design differs from the old catalyst design of a decade ago in that the new catalyst offers less resistance to gas flow. This reduced resistance to gas flow is expected to allow the plant to operated at a higher rate. No physical modifications are necessary to achieve the higher rate.[8]

CFI advised DEP that it did not consider the work to be either reconstruction or a modification but rather was routine maintenance and repair. DEP agreed, determined that CFI's work did not constitute a "physical change" and modified the operation permit to reflect the higher production rate.

The only meaningful distinction that can be drawn between the CFI situation of about a year ago and the restart of Piney Point's sulfuric acid plant is that CFI's plant had been idle for a longer period of time. In the instance of CFI, DEP's analysis of capital costs disclosed that the work was not "reconstruction" or a modification triggering NSPS review and was not a "major modification" prompting new source review.

B. Not Reconstruction

As stated previously, Piney Point's sulfuric acid plant will comply with NSPS. It is already so permitted. But in any event the Piney Point's repair and replacement work is not "reconstruction."

DEP defines reconstruction in Rule 62-210.200(185), Florida Administrative Code in relevant part:

> [R]econstruction of an emissions unit is presumed if the fixed capital cost of the new components exceeds 50 percent of the fixed capital cost of a comparable new emissions unit. The concept of reconstruction shall be used only with respect to emissions units located in a

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[8] Letter to G. Kissel, 11/22/95.

nonattainment area that are major for the pollutant for which the area is nonattainment.

Leaving aside the fact that Piney Point is not located in a nonattainment area (or even in an area of influence of a nonattainment area),[9] Piney Point has established that this project is not a "reconstruction." Specifically, and as Piney Point Phosphates, Inc. has shown, the cost of new components do not exceed half of what a new plant would cost. While Manatee County speculates about previous work and complains about the need for additional information, the company has presented to DEP what it intends to do, how much it will cost, and what a new grassroots plant would cost in comparison. And some of this work involves repair as a consequence of wind storm damage. Moreover, the company could do far less work than it is doing and still restart the plant. As already discussed, previous work that Manatee County refers to consisted of scheduled maintenance turnarounds.

C. Not a Modification or Major Modification

DEP's air pollution rules contain at least two complex, multi-part definitions of "modification."[10] Additionally, these rules incorporate the federal definitions of "modification" thus introducing a byzantine maze of variables to determine what is, or what is not, a "modification." By invoking these federal regulations and voluminous accompanying commentary, and making certain factual leaps, the door opens for a skillful advocate to argue that virtually any work at an air pollution source is a "modification" or a "major modification." Such a determination of course triggers heightened reviews and scrutiny; additional expense and delay for the regulated industry; and an array of opportunities for litigious project opponents.

Piney Point Phosphates, Inc. respectfully submits that all definitions of "modification" (regardless of where codified and including those relied on by Manatee County) contain two parts:

1. A physical change, and

2. A resulting emissions increase

There are pages of regulations, complex explanations with examples, case law and commentary on how an emissions increase is identified,

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[9] A circumstance that Manatee County ignores in its letter.

[10] Rules 62-204.200(24) and 62-210.200(185), Fla. Admin. Code.

and how emissions are to be determined, to decide if there is a modification. But before that analysis ever occurs, there must first be a "physical change."

DEP's Rule 62-210.200(185), Florida Administrative Code and various federal and state counterpart definitions contain a list of things that are not a physical change. For example, Rule 62-210.200(185) states that a physical change does not include:

> Routine maintenance, repair, or replacement of component parts of an emissions unit.

This of course is exactly what Piney Point has described to DEP. Manatee County does not take into account that the type and nature of an industrial plant is relevant in determining what kind of work constitutes routine maintenance, repair, or replacement of component parts. Correspondence concerning municipal waste combustion and iron ore processing are of no assistance in evaluating work at a phosphate fertilizer plant. Rather, the regulations implementing Section 111 of the Clean Air Act require maintenance, repair, and replacement of component parts to be considered by "source category":

> (e) The following shall not, by themselves, be considered modifications under this part:
>
> (1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source category, subject to the provisions of paragraph (c) of this section and s. 60.15.[11]

The specific work undertaken by Piney Point Phosphates, Inc. is squarely within "routine maintenance, repair, and replacement of component parts." Rule 62-210.200(185), Fla. Admin. Code. In the phosphate fertilizer industry, the plant components like that Piney Point will replace or repair are commonly replaced or repaired during scheduled turnarounds. The exception is the cooling tower that was damaged by the 1993 "No Name Storm." It should not be forgotten that the plant is the subject of existing operating

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[11] 40 CFR s. 60.14(e)(1)(emphasis supplied). "Paragraph (c)" relates to additions or expansions to a facility and is not applicable here. The reference to "Section 60.15" is significant, disclosing a regulatory nexus between criteria for "reconstruction" and what is considered routine maintenance, repair, and replacement of component parts for a source category. See note 13, infra.

permits and can operate as frequently or infrequently as it likes, provided it complies with the provisions of its permits.

Manatee County refers to the decision in Wisconsin Electric Power Company v. Reilly, 893 F.2d 901 (7th Cir. 1990) ("WEBCO"). In WEBCO, the court considered the kind of repairs, maintenance, and replacement of component parts that electric utilities, as a source category, routinely undertake during scheduled equipment outages. In so doing, the court emphasized the importance of previous agency determinations for the same source category. In determining that the proposed work was a "modification" the court noted that the work on the WEBCO power plant was not in the category of repetitive maintenance normally performed during scheduled equipment outages.[12] Thus, the WEBCO plant could not avail itself to the exception for routine maintenance, repair, or replacement of component parts. 893 F.2d at 911.

The work proposed by Piney Point Phosphates, Inc. is the opposite of that considered by the court in WEBCO. Except for the cooling tower that was damaged by a windstorm, the components that are being repaired or replaced by Piney Point Phosphates, Inc. are items that are routinely repaired or replaced during scheduled turnarounds at fertilizer plants. Therefore, no physical change is involved. Consequently, the project can be neither an NSPS modification nor an NSR major modification.[13]

D. Not a Shutdown

Manatee County's "shutdown" discussion requires little response. The county's argument is factually wrong and circular. The permit for the new sulfuric acid plant has been approved by DEP but not issued because (and only because) of Manatee County's interference. Piney Point Phosphates, Inc. has taken steps, already described herein, to prevent plant deterioration--a circumstance that the county fails to take into account. Piney

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[12] This finding was based on WEBCO's own description of the project, which was estimated to cost over $70 million. 893 F.2d at 912.

[13] Manatee County puts forward the premise that the sheer magnitude of the work alone establishes that it is not "routine." This premise is both factually and legally incorrect. It is factually incorrect because the work is routine for this source category. It is legally incorrect because a project's cost, alone, is determined by the "reconstruction" regulations, discussed supra, which are inapplicable here.

Point Phosphates, Inc. is offended by, and denies, allegations that it is attempting to "evade" any laws or requirements. To the contrary, the company has been forthcoming, and has attempted to inform Manatee County of its plans to no avail. In any event, this is not a Rule 62-210.300(6)(b) shutdown. To claim otherwise is to take serious liberties with the facts and the law.

E. Notice to Manatee County

DEP has been asked to provide notice to Manatee County. Piney Point Phosphates, Inc. is not certain what it is that DEP would give notice of. Obviously, Manatee County has already received actual notice of the company's work and also DEP's conclusions--now over a month old. I believe that regardless of whether or not there is notice the County will, once again, commence litigation for the purpose of stopping the company from using its property and operating its plant.

In closing, Piney Point Phosphates, Inc. and this office look forward to working with the Department and will answer any questions that you have. We are available at any time to discuss any aspect of this work, or the plant, with you or DEP staff. Finally, a copy of this letter is being provided to the list of individuals that were shown as copied with Manatee County's letter.

Thank you.

Sincerely,

Paul H. Amundsen

PHA/wp
cc: (By U.S. Mail)
Dr. Richard Garrity
Bill Thomas
Gerald Kissel
Howard Rhodes
✓Clair Fancy
Brian Beals, EPA
Scott Davis, EPA
Joyce Chandler, EPA OECA
Ellen Porter, National Park Service
David Soloman, EPA
Hamilton Rice, Jr.
Karen Collins
David S. Dee