EXHIBIT C- ACCESS AGREEMENT

ACCESS AGREEMENT – STATE OF FLORIDA

This Access Agreement ("Agreement") is entered into between the State of Florida Department of Environmental Protection ("Department") and Broward County, a political subdivision of the State of Florida (referred to herein as either "Property Owner" or "County") (Department and Property Owner referred to collectively as "Parties") to formalize the Parties' understanding of certain matters at issue between the Department and Property Owner relating to the remediation of the Property (as defined below), which is part of the Petroleum Products Corporation Superfund Site.

The Department is the administrative agency of the State of Florida having the power and duty to protect Florida's air and water resources and to administer and enforce the provisions of Chapters 376 and 403, Florida Statutes ("Fla. Stat"), and Rule 62-780 and 62-777, Florida Administrative Code ("F.A.C.").

Property Owner is a person within the meaning of Section 403.031(5), Fla. Stat. Property Owner is owner of property located northeasterly of Carolina Street and Southwest 21st Street, Pembroke Park, Broward County, Florida, 33009, Broward County Property Appraiser Folio Number 5142-20-00-0440, described in the attached legal description and tax deed in **Attachment A** (the "Property") and shown on the location map in **Attachment B**.

1. Eligibility. The Property is part of a contaminated site known as the Petroleum Products Corporation Superfund Site ("Site") with Facility Identification Numbers 068732818 and ERIC_3796. The contamination was determined to be eligible for state-funded remediation assistance in the Early Detection Incentive Program ("Program") August 22, 1990. This Agreement does not change and is not intended to modify any Program requirements. See ss. 376.3071. Fla. Stat.
2. Site Access.

a. Subject to and consistent with the Department's obligation to fund remediation of the Property pursuant to the August 22, 1990, Administrative Order in Petroleum Products Corp. v. State of Florida Department of Environmental Regulation, OGC Case No. 87-0028 and DOAH Case No. 87-3124 (1990 WL 142708, Fla. Dept. Env. Reg.) (attached hereto as Attachment C) ("1990 Order"), Property Owner gives permission to the Department to access the Property ("Access Permission"), without any fee or charge to the Department or contractors including remediation contractor, subcontractors, vendors, and Department-contracted site management and local government contractors ("Contractors").

b. This Access Permission is granted for activities which may be performed by the Department or its Contractors to locate contamination, determine contamination levels, and remove and remediate contamination as further described in paragraph 3. Such activities shall be conducted in a reasonable and safe manner consistent with the requirements of the to-be-entered Consent Decree, its Statement of Work ("SOW"), the Remedial Action Work Plan as approved by the United States Environmental Protection Agency ("EPA") and contemplated by EPA's 2021 Record of Decision ("ROD"). The Department or its Contractors may but are not limited to, the following activities (collectively referred to as Activities1):

- conduct soil, surface, subsurface, and groundwater investigations, including but not limited to entry by a drill rig vehicle and/or support vehicle;
- install and remove groundwater monitoring wells;
- use geophysical equipment;
- use an auger for collecting soil and sediment samples;
- locate existing wells;
- collect waste, soil, and water samples;
- remove, treat and/or dispose of contaminated soils and water;

[1] "Activities" specifically excludes destruction or demolition of buildings or improvements on the Property owned by the County. If demolition is required, such matters will be addressed in a Demolition Agreement between the applicable parties.

- remove contaminated soil by digging with backhoes, large diameter augers and similar equipment;
- deliver, install, operate, and remove, remedial equipment;
- install and remove utility connections;
- trenching for connection of remediation wells to equipment; and
- conduct surveys, prepare site sketches, and take photographs.

c. Access Permission shall continue until the Department issues a site rehabilitation completion order pursuant to Rule 62-780.680, F.A.C. (”SRCO”), at which time the Property Owner shall be provided a copy of the SRCO and this Permission shall be automatically terminated.

d. Failure to provide reasonable access to the Property will constitute a material breach of this Agreement if, after the Department provides written notice to the Property Owner regarding failure to provide reasonable access, Property Owner fails to cure the failure to provide reasonable access to the Property within 14 calendar days as well as potentially forfeit Program eligibility.

e. Property Owner shall use all reasonable efforts to obtain any necessary access for work to be performed if other entity(ies) control access to the Property. If access cannot be obtained, or if obtained access is revoked by Property Owner or entities controlling access to the Property to which access is necessary, Property Owner shall notify the Department within five business days of such refusal or revocation.

f. The Department may at any time seek to obtain access as is necessary to implement the terms of this Agreement. If the Property Owner is found to have acted unlawfully, it shall reimburse the Department for any damages, costs, or expenses, including expert and attorney’s fees that the Department incurs in connection with its efforts to obtain access to the Property as is necessary to implement the terms of this Agreement.

3. Cleanup Requirements. This Property shall be remediated pursuant to Chapters 62-780 and 62-777, F.A.C., and the Comprehensive Environmental Response, Compensation and Liability Act requirements as documented in EPA's 2021 Record of Decision (ROD) for this Site (https://semspub.epa.gov/work/04/11160959.pdf).
4. Sale of Property. In the event of a sale or conveyance of any portion of the Property, if all of the requirements of this Agreement have not been fully satisfied, Property Owner shall, at least 90 days or as soon as possible prior to the sale or conveyance, (a) notify the Department of such sale or conveyance, (b) provide the name and address of the purchaser, and (c) provide a copy of this Agreement with all attachments to the purchaser/transferee. The sale or conveyance of the Property does not relieve Property Owner of the obligations imposed in this Agreement. Sale of the Property will cause the Department to cease any and all Activities on the Property that is sold until a new Agreement is provided to the Department so that work can continue. Failure of a purchaser/transferee to provide the Department with Access may jeopardize the Department's funding of continued work on that Property.
5. Activities Funded. The Department will fund only those Activities at the Site associated with the eligible contamination in the Department's determination that may pose a threat to the public health, safety, or welfare; water resources; or the environment [ss. 376.3071(4), Fla. Stat.] and/or are necessary to complete the remediation described in paragraph 3. Nothing herein shall limit or modify the Department's obligations pursuant to the 1990 Order.
    a. Such Activities include those listed under paragraphs (2)(b), (3), (6) if applicable, and (7) only if outlined in the ROD, the Remedial Action Work Plan and/or the SOW and if enumerated in paragraphs 376.3071(4)(a)-(f),(j)-(k), and (o) and 376.3071(5)(b) and (c), Fla. Stat. The ROD, Remedial Action Work Plan, SOW, and this Agreement cannot

expand what the referenced statutes allow the Inland Protection Trust Fund (IPTF) to pay for in the Program.

b. Such funding from the IPTF and/or the Department does not include for the Property Owner or any others compensation for any alleged inconvenience, nuisance, lost business, or other economic injuries or damages; the cost of temporary or permanent relocation of any person(s) who may be using or occupying the Site including but not limited to renters, tenants, or Property Owner; the cost of preparing the Site (or any structures or buildings on the site) for demolition of structures, if applicable, or legal fees.

6. Demolition of Structure(s). If demolition of any non-remediation structures will be required pursuant to paragraph 3, Property Owner and the Department will execute a separate agreement describing the structure(s) to be demolished and timeline. Property Owner, however, affirms and accepts that it will not receive any compensation from the Department for the value of any structure that will be demolished; provided, however, that the Property Owner may receive compensation that does not violate ss. 376.3071(6)(m), Fla.Stat., from sources other than the Department or Contractors for the value of the structure, the loss of income due to the demolition of the structure and any other loss. Demolition will not be delayed for the Property Owner to negotiate compensation with third parties. In addition, if there are tenants on the Property:

a. Notice to Tenants. Property Owner shall notify tenants, lessees, residents and other occupants of the Structure identified for demolition (collectively referred to herein as ”Tenants”) of the termination of their lease and of the demolition date. If necessary and/or required by applicable law, the Property Owner shall complete all legal processes, including eviction, if necessary, to ensure that all affected Tenants have left

the Property before the demolition preparation date. The Department is not responsible for locating, noticing, or evicting Tenants. The Department is also not responsible for relocating Tenants. Notice to any occupants of nearby structures that will not be demolished on the Property shall also be provided at the same time.

b. Prepare Demolition Site. The Property Owner shall bear responsibility to contact utility companies to request disconnection of any electrical connections to any and all Structures to be demolished, if applicable. In addition, Property Owner shall remove any furniture, lighting, personal items, etc., that may be in those Structures. The Department will not secure or protect any items remaining in the Structures after the deadline.

7. Post-remediation Property Restoration. After the remediation is complete, any restoration will proceed as required by the Consent Decree, and consistent with the SOW and the Remedial Action Work Plan and with the Department's prior review, approval, and concurrence. The Department shall determine what is reasonable and only pay the reasonable costs of restoring the Property as nearly as practicable to the conditions which existed prior to activities associated with contamination assessment or remedial action. Such restoration does not include the Department constructing structures, building(s) or paying the cost of re-building new buildings or structures.
8. Institutional or Engineering Controls. The Department explicitly reserves the right to construct and use, and Property Owner agrees to carry out and maintain, any institutional controls or combination of institutional and engineering controls in accordance with the ROD, the EPA and Department approved SOW, the Remedial Action Work Plan, and Rule 62-780.100(7), F.A.C., necessary to address the contamination consistent with the Department's Institutional Control

Procedures Guidance. See Rule 62-780.100(7), F.A.C. and located on the Department's website: https://floridadep.gov/waste/waste/content/institutional-controls-procedures-guidance**.**

9. Property Owner's Non-Interference. Property Owner shall not interfere with remediation contractors, subcontractors, or vendors when performing the Activities. Property Owner shall not damage any equipment including wells, piping, and remediation system that may be located on the Property. Property Owner shall notify the Department 90 days prior to commencement of any construction, demolition, or other work on the Property that may damage or destroy any part of the equipment installed under this Agreement.
10. Injury to Department. Property Owner shall not be liable for any injury, damage or loss on the Property suffered by the Department or Department employees unless caused by the gross negligence or intentional acts of the Property Owner's employees.
11. Governmental Immunity. Nothing herein is intended to serve as a waiver of sovereign immunity by either Party nor shall anything included herein be construed as consent by either Party to be sued by a third party in any matter arising out of this Agreement. Each Party is a state agency or political subdivision as defined in Section 768.28, Florida Statutes, and shall be responsible for the acts and omissions of its agents or employees to the extent required by applicable law.
12. Contractor. The Department will select and authorize and make payment to a Contractor qualified to conduct the authorized Activities. Contractors must be licensed and insured, with Property Owner named as an additional insured, for not less than $1 million general liability coverage.
13. Public Records. All documents created or received associated with the Activities are a public record pursuant to Chapter 119, Florida Statutes. The Owner may retrieve any documents or other information related to the Activities online using the facility number referenced above. http://depedms.dep.state.fl.us/Oculus/servlet/login?action=login

14. Annual Appropriation Contingency. The State's performance and obligation to pay under this Agreement is contingent upon an annual appropriation by the Legislature. Authorization for continuation and completion of work and any associated payments may be rescinded, with proper notice, at the discretion of the Department based on Legislative appropriations. Nothing herein shall modify or be interpreted to modify the 1990 Order.
15. Time Frames. The Department's failure to adhere to any of the requirements or time frames of Chapter 62-780, F.A.C. or the ROD shall not give rise to a cause of action against the Department.
16. Limitation of Agreement. The Department hereby expressly reserves the right to initiate appropriate legal action to address any violations of statutes or the rules administered by the Department that are not specifically resolved by this Agreement. Nothing herein shall be construed to limit the Department's authority to take any statutorily authorized action against Property Owner in response to or to recover the costs of responding to conditions at or from the Property that require Department action to abate an imminent hazard to the public health, welfare, or the environment not otherwise authorized in the ROD. The Department also explicitly reserves its right, pursuant to Section 376.3071(7)(b), Fla. Stat., to seek recovery of all sums expended from the Department's trust funds pursuant to this Agreement that is not otherwise authorized pursuant to Section 376.3071(4), Fla. Stat., and this Agreement.
17. Third Parties. The provisions of this Agreement are only binding upon the Parties to this Agreement and should not be construed to affect any rights the Department may have against any other responsible parties for the violations or contamination addressed herein. The Department shall not be deemed to assume any liability for the acts, failures to act or negligence of the Contractor, its agents, servants, and employees. The Contractor shall not disclaim its own negligence to the Department, the Property Owner, or any third party.

18. No suit. Property Owner covenants not to bring an action against the Department pursuant to Chapter 70, 73, or 74, Fla. Stat. Property Owner acknowledges and waives its right to an administrative hearing pursuant to Sections 120.569 and 120.57, Fla.Stat., on the terms of this Agreement. Property Owner also acknowledges and waives its right to appeal the terms of this Agreement pursuant to Section 120.68, Fla.Stat.
19. Effective Date. This Agreement is effective upon execution of a Consent Decree with the United States Environmental Protection Agency for the remedial action at the Site and approval and entry by the U.S. District Court for the Southern District of Florida ("Effective Date"). Prior to the Effective Date, the 2018 Site Access Agreement between Property Owner and Department shall remain valid, enforceable and in full effect. After the Effective Date, this Agreement shall control.
20. Amendment. No modifications of the terms of this Agreement shall be effective until reduced to writing, executed by Property Owner and the Department, and filed with the clerk of the Department.
21. Assignment. This Agreement shall not be assigned by any Party without prior written consent of the non-assigning Party, and such consent shall not be unreasonably withheld.
22. Conflicting Provisions. This document constitutes the entire agreement and understanding of the Parties, and there are no representations, warranties, covenants, terms, or conditions agreed upon between the Parties other than those expressed in this Agreement.
23. Enforcement. The terms and conditions set forth in this Agreement shall be governed by and construed in accordance with the laws of the State of Florida and may be enforced in a court of competent jurisdiction in Broward County pursuant to Sections 120.69 and 403.121, F. S. In addition, failure to comply with the terms of this Agreement shall constitute a violation of Sections 376.302(1)(b) and 403.161(1)(b), Fla.Stat.

24. Remedies. All rights and remedies provided in this Agreement are cumulative and not exclusive of any other rights or remedies that may be available to the Department, whether provided by law, equity, statute, in any other agreement between the Parties or otherwise. The Department shall be entitled to injunctive and other equitable relief, including, but not limited to, specific performance, to prevent a breach, continued breach or threatened breach of this Agreement. No remedy or election hereunder shall be deemed exclusive. A failure to exercise or a delay in exercising on the part of the Department, any right, remedy, power or privilege hereunder shall not operate as a waiver thereof absent prejudice to the other party; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege.
25. Signatures. Electronic signatures or other versions of the Parties' signatures, such as .pdf or facsimile, shall be valid and have the same force and effect as originals. Original signatures by all signing entities are not required to be inclusive on one original Agreement document. The persons signing hereby affirm they are authorized to bind their principals.

IN WITNESS WHEREOF, the Parties hereto have made and executed this Agreement: BROWARD COUNTY through its BOARD OF COUNTY COMMISSIONERS, signing by and through its County Administrator, authorized to execute same by Board action on the 12th day of March, 2013, (Regular Meeting Agenda Item #8, Motion B) and the State of Florida Department of Environmental Protection, signing by and through its duly authorized representative.

COUNTY

BROWARD COUNTY, by and through
its County Administrator

By: _____
County Administrator

____ day of _____, 20__

Approved as to form by
Andrew J. Meyers
Broward County Attorney
115 South Andrews Avenue, Suite 423
Fort Lauderdale, Florida 33301
Telephone: (954) 357-7600

By_____
Michael C. Owens (Date)
Senior Assistant County Attorney

By_____
Annika E. Ashton (Date)
Deputy County Attorney

MCO/gmb
SAA Broward County.docx
2023-12-08

State of Florida Department of Environmental Protection:

_____	_____
Signature	Signature of Witness
_____	_____
Print Name Date	Print Name Date

Title _____

Attachments:
Attachment A - Legal description of the Property and Tax Deed.

Attachment B - Figure/ Site Map of Property

Attachment C - August 22, 1990, Administrative Order

Attachment A

LEGAL DESCRIPTION:

Section 20, Township 51 South, Range 42 East, the North 200 feet of the South 225 feet of the East ½ of the Southwest ¼ of the Northeast ¼ of the Southeast ¼, LESS the West 175 feet therefrom. Said land, located in Pembroke Park, Broward County, Florida and contains 31 ,670 square feet; being the same property conveyed to Broward County by Tax Deed 16135, dated 11/1/2002, recorded in Official Records Book 34067, Page 220 of the Public Records of Broward County, Florida.

Exhibit C - ACCESS AGREEMENT

18

Tax Deed File No. 16135 **DR-506**

Property Identification No. 1220 00 044

R.01/95

Tax Deed

State of Florida

County of Broward

FOR OFFICIAL USE ONLY

The following Tax Sale Certificate Numbered 11944 issued on 6/1/89 was filed in the office of the tax collector of this County and application made for the issuance of a tax deed, the applicant having paid or redeemed all other taxes or tax sale certificates on the land described as required by law to be paid or redeemed, and the cost and expenses of this sale, and due notice of sale having been published as required by law, and no person entitled to do so having appeared to redeem said land; such land was on the 24th day of August, 1994, offered for sale as required by law for cash to the highest bidder and having no bids at the sale and Revenue Collector having complied with Sec. 197.502(3) F.S., and the land having escheated to the County of Broward pursuant to Sec. 197.502(8) F.S., the undersigned Deputy County Administrator conveys the following described land to said Board of County Commisioners of the County of Broward, State of Florida, whose address is 115 S. Andrews Avenue, Fort Lauderdale, Florida 33301.

Now on this 24th day of August, 2001, in the County of Broward, State of Florida, in consideration of the sum of ($ 0.00) ---------- Dollars, being the amount paid pursuant to the Laws of Florida does hereby convey the following lands, including any hereditaments, buildings, fixtures and improvements of any kind and description, situated in the County and State aforesaid and described as follows:

20-51-42
N 200 OF S 225 OF E1/2 OF SW 1/4
OF NE1/4 OF SE1/4 LESS W 175
THEREFROM

Witness: Terry Rogers

Cindy Stevens

(Seal)

~~Clerk of Circuit Court or County Comptroller~~
Deputy County Administrator

Broward **County,**

Florida.

State of Florida

County of Broward

On this 1st day of November, 2002, before me John Cameron Story, Jr personally appeared Jan Leland, Deputy County Administrator, ~~Clerk of the Circuit Court or County Comptroller~~ in and for the State and this County known to me to be the person described in, and who executed the foregoing instrument, and acknowledged the execution of this instrument to be his own free act and deed for the use and purposes therein mentioned.

Witness my hand and office seal date aforesaid.

John Cameron Story, Jr.

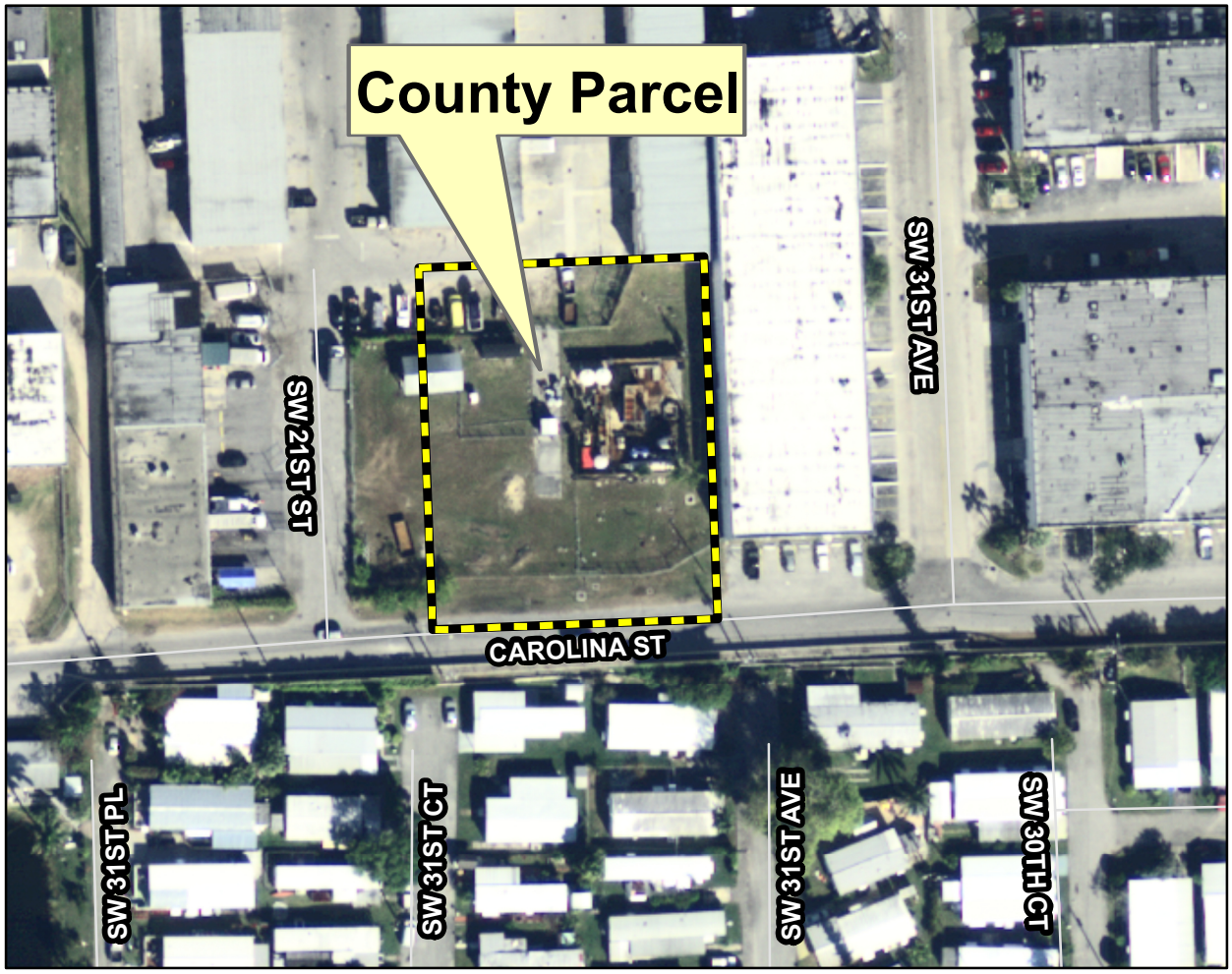
JOHN CAMERON STORY, JR.

John Cameron Story, Jr.
Commission # DD 008704
Expires June 18, 2005
Bonded Thru
Atlantic Bonding Co., Inc.

Attachment B

Aerial Location Map

Parcel ID No: 514220000440



1990 WL 142708 (Fla.Dept.Env.Reg.)

Department of Environmental Regulation

State of Florida

PETROLEUM PRODUCTS CORPORATION, PETITIONER,

v.

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION, RESPONDENT.

OGC Case No. 87–0028
DOAH Case No. 87–3124
August 22, 1990

FINAL ORDER

***1** On July 9, 1990, a hearing officer from the Division of Administrative Hearings submitted to me and all parties his Recommended Order, a copy of which is attached as Exhibit I. On July 23, Respondent, the Department of Environmental Regulation ("Department"), filed an exception to the Recommended Order, attached as Exhibit II. Petitioner, Petroleum Products Corporation ("Petroleum Products"), timely filed a response to the exception. The matter thereafter came before me as Secretary of the Department for final agency action.

Background

This matter arises from an application by Petroleum Products for reimbursement from the Inland Protection Trust Fund of the costs of assessment and clean up of soil and groundwater contamination at its site in Broward County, Florida, under the State Underground Petroleum Environmental Response ("S.U.P.E.R.") Act, Section 376.3071, Florida Statutes. The Department proposed to deny eligibility, and Petroleum Products made a timely challenge to that determination in a petition for formal administrative proceedings. After a hearing held on July 24 and August 21, 1989, the hearing officer recommended that the Department grant the reimbursement application. The hearing officer found that the contamination was the result of leaks and spills from storage tanks containing used oil, approximately 90% of which was reprocessed for use as fuel. The remainder was reprocessed for use as lubricants. The hearing officer concluded, among other things, that the spills and leaks were thus primarily of petroleum products that are a liquid fuel commodity from a petroleum storage system, as those terms are defined and used in the S.U.P.E.R. Act and further interpreted in Puckett Oil Co. v. Department of Environmental Regulation, 10 FALR 5525 (Final Order September 1, 1988), rev. on other grounds, 549 So.2d 720 (Fla 1st DCA 1989). He thereupon recommended that the site should be eligible for reimbursement.

Ruling on Exception

The Department takes exception to further statements by the hearing officer that question the interpretation in Puckett and suggest that the lubricants would by themselves be eligible for reimbursement as a liquid fuel commodity. To the extent such an inference exists in the recommended order, I accept the exception, and I incorporate the exception by reference into the Final Order as a modification of the recommended order. I reject the response by Petroleum Products, which argues that I should no longer apply the analysis in Puckett, in defining a liquid fuel commodity, that the Department must look at how a petroleum product is used in determining whether it is a liquid fuel commodity. Rather, as I stated in Red Top Sedan v. Department of Environmental Regulation, 12 FALR 214 (Final Order September 14, 1989), affirmed per curiam _____ So.2d _____ (Fla 1st DCA 1990), the functional use analysis of Puckett is still applicable as Department policy. Particularly given the affirmance of the Red Top Final Order, I reject the hearing officer's suggestion that I recede from that policy.

***2** Nonetheless, as Red Top also states and as the exception acknowledges, the Department must also look at eligible and ineligible sources that have resulted in a mixed plume of contamination in terms of which source is the predominant one. Since the hearing officer found, based upon competent substantial evidence and contrary to the initial determination by the Department when it proposed to deny eligibility, that the contamination plume resulted from leaks and spills from petroleum storage systems primarily containing used oil intended for use as fuel, and since the facility is otherwise eligible under Section 376.3071, Florida Statutes, I therefore conclude that Petroleum Products's application for reimbursement under the S.U.P.E.R. Act must be granted.

Therefore, it is

ORDERED:

1. The hearing officer's findings of fact and conclusions of law are adopted in this Final Order, except as modified by this Final Order and by the Department's exception, which is incorporated by reference into this Final Order.

2. The application of Petroleum Products for eligibility to participate in the cleanup program funded by the Inland Protection Trust Fund is hereby granted.

DONE AND ORDERED in Tallahassee, Florida this 22 day of August, 1990

DALE TWACHTMANN
Secretary

RECOMMENDED ORDER

This cause was heard by William R. Dorsey, Jr., the assigned Hearing Officer of the Division of Administrative Hearings, on July 24 and August 21, 1989, in Tallahassee, Florida.

APPEARANCES

For Petitioner:
R.L. Caleen, Jr., Esquire OERTEL, HOFFMAN, FERNANDEZ & COLE
Post Office Box 6507
Tallahassee, FL 32314–6507
For Respondent:
E. Gary Early, Esquire
Department of Environmental Regulation
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, FL 32399–2400

STATEMENT OF THE ISSUE

The issue is whether the application of Petroleum Products Corporation for reimbursement of the cost of assessment and clean-up of soil and groundwater contamination at its site in Broward County, Florida, under the State Underground Petroleum Environmental Response Act of 1986 should be granted.

PRELIMINARY STATEMENT

The Department of Environmental Regulation (Department) proposed to deny the eligibility of Petroleum Products Corporation to receive reimbursement under the State Underground Petroleum Environmental Response Act, Section 376.3071, Florida Statutes, for the costs of assessing the contamination and cleaning contamination at its property in Pembroke Park, Broward County, Florida on December 8, 1986. Petroleum Products made a timely challenge to that determination in a petition for formal administrative hearing.

Petroleum Products Corporation alleged that it, and its predecessors, had operated a used oil recycling facility on the site for more than 20 years which resulted in site contamination; that it expended approximately $150,000 conducting petroleum contamination assessments and rehabilitation on the site, with additional assessment and clean-up costs to be incurred; and that the Department was currently removing oil from the groundwater by means of recovery wells, the cost of which Petroleum Products Corporation might ultimately be required to pay.

***3** At the request of the parties, the hearing was delayed until two related, consolidated cases were heard, Puckett Oil v. DER and International Petroleum Corporation v. DER. They also raised issues of whether used oil contamination was eligible for cost reimbursement under Section 376.3071. In deciding these cases, the Department reversed its earlier position and decided that used oil could be a "petroleum product" as defined by Section 376.301(10), Florida Statutes.

Due to this change of interpretation, the Department filed a Notice to Amend its earlier denial of Petroleum Product's eligibility for reimbursement, but continued to deny eligibility for the following reasons:

(1) a "substantial portion" of contamination at the property was attributable to disposal of sludge and hazardous contaminated fill material;

(2) these substances are not used oil, and could not be classified as "petroleum products" eligible for clean-up at state expense; and

(3) Petroleum Products Corporation had not established that the contamination at its site is the result of leaks of recyclable used oil from petroleum storage systems.

The parties filed a prehearing stipulation. The issue it framed is Petroleum Product Corporation's eligibility to receive reimbursement of site rehabilitation costs resulting from leaks and spills of used oil and virgin petroleum from its stationary storage tanks. The Department asserted in the stipulation that the application should be denied because:

(1) the predominant source of site contamination is due to the placement of acid/clay sludge on the site, generated by re-refining processes, which originally had been kept in two deep pits;

(2) free product contamination on the site is not significant in terms of overall site contamination and costs of rehabilitation;

(3) the free product is the result of leaching of sludge as well as possible discharges from tanks;

(4) tanks at the site included process tanks as well as storage tanks; and

(5) other tanks held lubricating oil or used oil intended to be recycled as lubricating oil, both of which are ineligible for state reimbursement of clean-up expenses in the Department's view.

At the final hearing, Petroleum Products Corporation presented the testimony of its president, Jerrold Blair; H. Clark Dantzler, Jr., an expert in the operation of used oil recycling facilities between 1959 and 1970; and George McDonnell, P.E., an expert in professional engineering with an emphasis on the operation of used oil recycling facilities.

Petroleum Products' exhibits numbered 1, 2, 8, 9, 10, 12A–I, 13A through E, 14, 16, 17, 19, 20, 21, 22, 23, 24, and 25 were received in evidence. It was permitted to supplement its exhibit number 8 by filing, after the hearing, copies of additional sludge removal receipts.

The Department presented the testimony of John Ruddell, Chief of the Bureau of Waste Cleanup; Barry Levine, a hydrogeologist; Steven Bedosky, a department employee; William G. Dean, an engineer and department employee; and Gary Webster, an employee of Hunter Environmental Services, Inc., and John Svec, an engineer and department employee. The Department's exhibits numbered 1, 1–A, 2, 2–A, 3, 4–A through D, 5, 6, 7, 8, 9, 10, 11, and 13 were received in evidence.

***4** After the hearing, a further deposition of Mr. Jerrold Blair was taken on November 13, 1989, which was filed on November 16, 1989. Additional receipts for sludge tickets which should be part of the deposition of Mr. Blair were filed on November 9, 1989. These receipts were obtained from the United States Environmental Protection Agency in Atlanta, Georgia, where they had been stored. The Department's Motion to Strike those late filed exhibits is denied. That the sludge was taken to a city landfill rather than a county landfill is not significant. The receipts came from the EPA files or Petroleum Products Corporation.

FINDINGS OF FACT

1. The Legislature provided a system for the clean-up of sites contaminated as the result of the storage of petroleum or petroleum products in the State Underground Petroleum Environmental Response Act of 1986 (Super Act), Chapter 86–159, Laws of Florida, codified primarily as Section 376.3071, Florida Statutes.

2. The Super Act contains a reimbursement program funded by the Inland Protection Trust Fund. Section 376.3071(12), Florida Statutes, permits reimbursement of allowable costs for the rehabilitation of sites contaminated from discharges related to the storage of petroleum or petroleum products.

3. Petroleum Products Corporation owns a parcel of land located at 3130 Southwest 17th Street, Pembroke Park, Florida. From 1959 to 1970 Petroleum Products Corporation operated a facility on that land which collected used oil from service stations and automobile dealerships, processed it, and sold it either as fuel oil or lubricating oil. About 90% of 150,000 gallons of used oil processed monthly at the facility was sold as fuel; the remaining oil was sold as lubricating oil, but even when sold as lubricating oil, it was sometimes burned as fuel because re-refined oil makes good fuel. The storage tanks were located on the southeastern portion of the property, near Carolina Road.

4. The facility used a two-phase distillation process. Used oil was distilled to remove water, after which it could be sold as fuel oil. If processed in the second phase, for sale as lubricating oil, it was distilled further, and treated with sulfuric acid and clay to remove additives and residue, and change color. This phase produced a waste consisting of acid/clay sludge. This sludge is generally very black, and has a pH of approximately 3. It is very viscous, and has the consistency of roofing cement; laymen would describe it as tar. It does not flow easily, but is liquid enough to be pumped. This processing also occurred in the southeast part of the property.

5. While the recycling facility produced lubricating oil using the acid/clay treatment from 1959 to 1970, the acid sludge was hauled to a municipal dump, or placed in pits dug into the ground on the north and east of the plant site. When the pits were dug, they were dug below the water level, and there was water in the pits before the sludge was dumped in them. The disposal of sludge in pits on the recycling site was a prevailing industry practice, and violated no regulatory requirements at the time. Operators considered on-site disposal of sludge preferable to hauling sludge to a landfill. During periods of heavy rain, some of the sludge may have overflown the pits and spread to nearby land, where it would become mixed with the surface soil.

***5** 6. Petroleum Products Corporation ceased making lubricating oil in 1970, but continued to process used oil into fuel oil. The local Broward County Pollution Control Agency asked Petroleum Products Corporation to remove the acid/clay sludge

from its property, and to refill the pits with other fill material. Petroleum Products Corporation acceeded to this request, and a great volume of sludge, perhaps hundreds of thousands of gallons, was removed from the pits, which were then refilled under the supervision of the Broward County Pollution Authority. Receipts Petroleum Products Corporation produced at the hearing, or thereafter from the custody of the U.S. Environmental Protection Agency, show that more than 150 truck loads of sludge were removed and hauled to landfills operated by Metropolitan Dade County or by the City of Surfside. Some pockets of the sludge remain at the site of the pits because they were not completely emptied. The backfill was clean fill, and the area was then bulldozed so that warehouses could be constructed in the area. This filling and bulldozing changed the contour of the land from what it had been in the past.

7. The Department contends that much of the sludge was spread out over an extended area of the site, and not removed to landfills. The evidence is persuasive that almost all of the sludge from the pits was removed to landfills. The testimony of Mr. Blair denying that the sludge was spread was credible. In addition, on-site spreading of the sludge would have been impracticable. As a tar-like substance, if spread out, it would have been tracked everywhere. It would stick to the tracks or wheels of any vehicles operating on the surface, and was so acidic it would burn or irritate the skin of anyone who came in contact with it. It would be extremely difficult to perform maintenance on equipment used to spread the sludge because of the need to clean the sludge off, so that the mechanic would not be burned.

8. In addition, there are a large number of receipts evidencing the systematic hauling of the sludge to landfills. The logic of Mr. McDonnell's testimony is persuasive:
If you have the alternate, which they obviously did, of hauling it away and simply dumping it, no one would go out and deliberately choose to do a very difficult job [spreading the sludge over the property] where there is an easy alternative available to them. (Tr. 285)

Although the facility ceased its re-refining of lubricating oil in 1970, it continued to collect, process, and sell used oil as a fuel until 1984. About 150,000 gallons per month of used oil were processed and sold as fuel.

9. The oil was typically crank case engine oil which contained the substances normally found in used oil of that type. There is no persuasive evidence that Petroleum Product Corporation ever received any hazardous waste, or mixed used oil with any hazardous waste.

10. Used oil is not listed as a hazardous waste by the U.S. Environmental Protection Agency or by the Department.

***6** 11. The used oil collected and recycled at Petroleum Product's facility was pumped into and stored in above-ground storage tanks. There were, over time, from 10 to 25 tanks, which ranged in size from 12,000 to 20,000 gallons. Normally, the facility stored between 400,000 and 500,000 gallons of used oil. Occasionally, the facility also received virgin oil, but it was processed quickly or sold because of its higher value. At the peak of its operation, the facility had 25 to 35 storage tanks.

12. Recycling operations had slim profit margins and were small operations. Storage tanks, pumps, and other equipment were bought used, often from other businesses dealing in virgin petroleum products. That used equipment was often rusty or deteriorating. Tank bottoms could have holes in them as the result of rust from standing water; tanks were sometimes riveted, and would have side or bottom leaks.

13. The tanks had virtually no overfill protection. When oil was pumped in, it would overflow from the top and run down the sides. Operators were typically not careful with the oil, because it had a very low value, about 2 to 5 cents a gallon. A spill of a few thousand gallons was regarded as an inconsequential matter.

14. The pumps used in storing oil often had leaks in packing seals, or had screw joints which would leak. Tank valves, also usually bought as used equipment, were often installed without new stem packing, and also would leak during operation. Almost

no preventive maintenance was done, because it was not cost-effective to do so. Equipment was repaired only if its current state of repair interfered with operations, which usually meant that leaks were not repaired until they created a fire hazard.

15. Leaks and spills from used oil storage tanks, including their pumps, valves, and piping, were common.

16. A great volume of used oil leaked or spilled from Petroleum Products Corporation's tanks, pumps, and piping over its 25 year operation.

17. There were also large oil spills resulting from four or five major fires at the facility in the 1960s. The fire in 1963, which may have been the result of vandalism, caused 40,000 to 60,000 gallons of use oil to spill from storage tanks; 8 or 10 tanks were destroyed. There were no dikes, so that the oil flowed freely. When firemen used water on the fire, the oil was absorbed into the soil.

18. Another major fire occurred in October, 1966 in which three oil storage tanks collapsed spilling about 50,000 gallons of oil. Another 25 foot high oil tank collapsed on a firetruck.

19. There is no way to know, with certainty, the volume of used oil, virgin oil, and lubricating oil which spilled or leaked into the ground on the site. It is reasonable to believe that 9 to 12 gallons of oil would have leaked or spilled each day at the facility, which would have resulted in spill of over 100,000 gallons of oil. This estimate, made by Mr. McDonnell, is credible and is conservative, given the volume of oil also spilled during the fires.

***7** 20. Petroleum Products Corporation does not contend that the leaks and spills from process tanks, rather than from storage tanks, are eligible for reimbursement of site assessment and cleanup costs. Oil leaked from both, however, and once in the ground, the oils are indistinguishable. Due to the capacity of the tanks and the years they were in use, however, it is reasonable to assume that 15% or less of the leaks and spills were attributable to process tanks.

21. After processing, most of the oil was burned as fuel. Some was used as a lubricant. The only difference between used oil sold as fuel or lubricant was that the lubricating oil had the additives removed and the color changed. Both burn well. There is an insufficient basis in this record to justify the Department's interpretation excluding this site from eligibility for cleanup because oil processing ocurred at the site to produce lubricating oil. Section 376.3071 does not disqualify all or part of a site from eligibility for cleanup reimbursement because a portion of the used oil stored there was ultimately used as lubricants.

22. In 1984 a Department investigator asked Petroleum Products Corporation to install exploratory wells to determine whether there was contamination at the site. Petroleum Products engaged the firm of Dames & Moore to undertake a preliminary investigation, which revealed that there was groundwater contamination in the form of floating hydrocarbons.

23. On April 1, 1985, the United States Environmental Protection Agency and Petroleum Products Corporation entered into a consent order agreement which required the removal of 17 above-ground tanks leaking used oil into the ground, which constituted a continuing source of contamination.

24. Petroleum Products Corporation contracted with Conversion Technology Corporation to recover and recycle the oil and wastes, with Waldron's tank cleaning services to clean the empty tanks and drum the sludge, with Cuyahoga Wrecking Service to make the tanks inoperable, and with Seven & Seven Transporters to remove the waste to a disposal facility. The employee of the U.S. Environmental Protection Agency who was in charge of the site commended Petroleum Products Corporation for its cleanup effort, and wrote
As the OSC [on-scene coordinator] for this EPA-monitored cleanup I may say that [Petroleum Products Corporation] exemplified industrial cooperation and responsibility in combating the vexing problem of hazardous waste management. (Petitioner's Exhibit 9)

Petroleum Products Corporation cooperated with the Environmental Protection Agency and with the Department in determining how to deal with the contamination. It has already spent approximately $150,000 to perform remedial action.

25. Contamination at the site is of three types: oil floating in the groundwater, soil contamination, and groundwater contamination.

26. It is not possible to clean any individual phase of the contamination without affecting the other phases. Attempts at remediation must be monitored to prevent an influx of organic contaminants into the aquifer. Similarly, the cost related to the cleanup of an individual phase of contamination cannot be isolated because of the inter-related nature of the cleanup phases.

***8** 27. The creation of a cone of groundwater depression is necessary for any recovery of the free or floating oil. The cost of recovery of the free product cannot be separated from groundwater cleanup because it is necessary to treat large quantities of groundwater involved in creating a cone of depression. To the extent that a proportion of the cost might be estimated, the cost associated with the recovery of free product would be a minor portion of the overall cleanup. There is currently a free product recovery effort in place at the site, which is intended to prevent further migration of the product off-site. This ongoing action is not considered an element of the site cleanup. The most feasible method of cleanup for the free product will involve the excavation of the soils to create a trench. The free product and ground water will be recovered as they flow into the trench.

28. During October and November of 1984, Environmental Science and Engineering, Inc., a consulting firm working under contract with the Department, assessed the extent of free floating oil in the groundwater under the Petroleum Product Corporation's site. Those consultants found a free floating layer of oil from 5″ to 30″ thick under approximately one-half of the one acre site Petitioner still owns. The free product generally mirrors the location of the former recycling facility and its storage tanks. The viscosity of the free product is comparable to about 40–weight engine oil.

29. Environmental Science and Engineering estimates that the floating layer of oil contains 20,000 to 60,000 gallons of recoverable petroleum product. The direction of ground water flow and the migration of contaminants off-site is to the east or southeast. The soil above the oil layer has been saturated with oil because of the fluctuations of the layer with movement of the water table as the area experiences heavy rains or dry spells.

30. Wells drilled in the location of the former sludge lagoons to the north and east of the plant site reveal a heavy slightly liquid type of sludge. The oil in the lagoon sites is immobile, and no free product collects in the wells after 24 hours. One sample collected in the mason jar shows a slight degree of oil separation after 24 hours. This anecdotal evidence of separation is not very informative, and is not persuasive that oil separates from the remaining sludge on-site. See, Finding 32, below.

31. A second assessment of soil and groundwater contamination was done by another consulting firm under contract with the Department, Ecology and Environment, Inc. That study showed free floating product at the site. The only calculation of the amount of free floating oil was that done by Environmental Science and Engineering, Inc., see, Finding 29, estimating that there would be 20,000 to 60,000 gallons of recoverable oil. That calculation understates the amount of oil in the ground. The estimate given by George McDonnell of 103,000 gallons is more persuasive. It is consistent that the large amounts of oil which leaked or spilled at the site over a 25 year period.

***9** 32. It is unlikely that any appreciable portion of the approximately 103,000 gallons of floating oil has its genesis in the separation of oil from the acid/clay sludge which had been disposed in the two lagoons for the following reasons:

1) Oil associated with acid/sludge would be quite acidic, and have a pH between 2 and 4. The pH scale is not a linear scale, so differences in pH are quite dramatic as the pH values change. Samples of free product shows a uniform pH of approximately 6 or 7. In almost all 31 monitoring or observation wells the pH is consistent with the characteristics of used oil, (a pH of 6 or 7), not the pH of sludge (a pH of 2 to 4). The only sample which disclosed a low pH was that taken in monitoring well number 3 which was located in the former sludge lagoon site.

2) The groundwater flows to the east or southeast. This does not explain the presence of free product to the west and southwest of the sludge pits nor the absence of free product to the east of the pits.

3) The viscosity of the oil is similar to that of 40–weight engine oil and not highly viscous, as the tar-like sludge would be.

4) The oil in the sludge pits is basically immobile and no free product surfaced in the monitoring well after waiting 24 hours.

5) The pH of the free product is nearly neutral. The Department believes that the sludge was mixed with lime rock or fill and spread over the site to increase the pH of the oil. This is unpersuasive. Mixing with lime rock would increase the pH of the sludge (tend to bring it towards neutral) but it would not cause the dramatic lowering of acidity which would bring the sludge to a pH of 6 or 7. In addition, the viscosity of the sludge would not be so changed by mixing the sludge with fill that its viscosity would become similar to that of 40–weight engine oil.

6) To believe that the free product results from sludge disposal rather than leaks ignores the normal operating practice of used oil recovery facilities in the late 50s and 60s where spills from storage tanks, pumps, and piping were very common.

33. Little of the free product has been recovered through the current remediation efforts. If not recovered, over time the approximately 103,000 gallons of floating oil will spread to adjacent property. To recover this oil by conventional trench or well recovery operations will probably cost $250,000 or more. The capital cost of the groundwater recovery/discharge system, with monitoring wells, will be about $85,000; cost of operating and maintenance are approximately $180,000.

34. The firm of Ecology & Environment, Inc., collected soil samples at 56 locations in two phases in its remedial investigation. Forty-six of the samples were taken at shallow depths (27 at 8 inches, 19 at approximately 10 inches); 10 more samples were taken in the old disposal pit sites at depths between 0 and 35 feet). The two primary classes of contaminants found in the soil were lead and organics (hydrocarbons associated with petroleum products). Both contaminants are found in used oil. The lead and organic contaminants were found in the shallow soils over the southern half of the site. Very little contamination was found beyond the main area of site activity. The soil contamination was concentrated in the plant and former disposal pit areas.

***10** 35. Samples with high lead concentrations were found in the former disposal pit sites. Contamination extended to a depth of 25 feet in one soil sample from a former pit, where oily plastic sludge was found with fine sand or clay. The two former pit sites are the only places with documented contamination below a 10 foot depth.

36. Although the organic contamination extended laterally further than the lead contamination, Environment & Ecology concluded that the wider distribution did not reflect contamination from Petroleum Product Corporation's activities. The general area has long been the site of commercial and industrial activities, and there are many other possible sources for contamination including a firing range, which would have been disposing of lead bullets fired at the range, a generator plant, and a former spray-painting facility. Solvents and other chemicals used in these activities would contribute to soil and groundwater contamination. The consultants had been told by area businesses that small scale dumping of industrial chemicals in the vicinity has been common.

37. Soil samples revealed a “great deal of heterogeneity.” There was no uniform distribution of soils in the shallow zone. This probably occurs because after the reprocessing operations ended in 1970, the land was cleared and filled, so that many of the warehouses now in the area could be constructed. Most of the upper 8 to 10 feet is fill material.

38. The ground water was monitored by installing 38 wells on the site, most of which were screened at depths of 10 to 12 feet. Five intermediate wells with depths of 50 feet and two deep wells of 100 to 200 feet were also installed. Every sample exhibited a pH of between 6.4 and 7.4. The primary contaminants were lead, organics, and chromium. The evidence does not indicate the source of the chromium. It is unrelated to Petroleum Product Corporation's activities.

39. The groundwater contamination, both metal and organic, was only in the shallow zone. It extends laterally roughly to the same extent of the shallow contamination found in the soil. This suggests that the contaminants in the soil migrated due to seepage from rainfall or fluctuation in the water table into the groundwater. The water table is about five feet below the land surface.

40. The Department has argued that the contaminants in the soil and groundwater were caused by mixing and spreading of the sludge material during the early 1970s over the surface of the area. This hypothesis has already been rejected for the reason stated in Findings 7 and 8, above.

41. It is more likely that the soil contamination resulted from frequent spills and leaks of oil from storage tanks years ago. The soil contaminants are those found in used oil. The area generally is flat. There was no impediment to oil spills flowing over a large surface area, following the contour of the land at that time.

42. Depending on the method used to clean up the site, the cost of rehabilitating the area will range between two and forty-six million dollars. It will cost over one million dollars to recover and treat contaminated groundwater. Approximately 110,000 cubic yards of contaminated soil must be removed and treated, the majority of that coming from the area outside the former sludge pits. The presence of contamination at the site is to be expected, given the site's former use. All of the 8 turnpike facilities and 8 maintenance yards operated by the Florida Department of Transportation report petroleum contamination from tanks, and the Department of Transportation has estimated cleanup cost will range from $20 to $30 million, although DER believes the cost may be $5 million. The cleanup will be funded by the Inland Protection Trust Fund, as would the reimbursement in this case. The cost of rehabilitation is in the range of estimates that the Department has received for other petroleum contamination sites.

***11** 43. In summary, the Petitioner's site is contaminated primarily from leaks and spills of used and virgin oils processed or unprocessed and from storage tanks, pumps and integral piping. Small spills were continuous and some associated with fires were massive. The only portion of the site not contaminated due to leaks and spills is the residual soil and groundwater contamination from the sludge disposal pits, which is a small part of the overall contamination.

CONCLUSIONS OF LAW

The Division of Administrative Hearings has jurisdiction over this matter. Section 120.57(1), Florida Statutes.

The Legislature recognized in Section 376.3071(1), Florida Statutes, that spills and leaks from stored petroleum and petroleum products pose a threat to surface and groundwater. The Legislature established the Inland Protection Trust Fund composed from an excise tax on petroleum products, so that cleanup of contamination related to the storage of petroleum would take place without delay. Sections 376.3071(2) and 206.9925(4), (5), Florida Statutes. The fund is used to pay for the cleanup of eligible contamination sites and the reimbursement of owners who undertake their own cleanup efforts.

The provisions of Section 376.3071 apply only to the cleanup of "contamination related to the storage of petroleum and petroleum products." Section 376.3071(2), Florida Statutes. The Department has argued that contamination related to the disposal of petroleum and petroleum products is ineligible for funding from the Inland Protection Trust Fund. Whether that may be true in other circumstances, it is not true here. Storage incident to re-refining or sale of used oil, whether as a fuel or a lubricant, is nonetheless storage of petroleum products. Most of the discharges here arose from the containment of used oil in tanks which were serving to store that used oil. A small amount of the contamination arises from pockets of sludge left after the sludge was hauled away.

As used in Section 376.3071, "petroleum products" includes "any liquid fuel commodity made from petroleum ..." Section 376.301(10), Florida Statutes. The Department has already found that used oil is a petroleum product within the meaning of the statute when it is being recycled. Puckett Oil Company v. DER, 10 FALR 5525 (1988), reversed on other grounds, 549

So.2d 720 (Fla. 1st DCA 1989). The evidence in this case is persuasive that used oil is commonly used as a fuel. It is therefore a "liquid fuel commodity" without regard to the intention of the person or entity which has stored the used oil for use either as a fuel or as a lubricant. The definition of "petroleum products" in Section 376.301(10) does not require any assessment of the owners subjective intention about used oil's ultimate use in determining whether that substance is a petroleum product. In contrast, the definition of "petroleum storage system" does contain an element of intention. Under that definition, a petroleum storage system is defined as

***12** a stationary tank not covered under the provisions of Chapter 377, together with any onsite integral piping or dispensing system associated therewith, which is used, or intended to be used, for the storage or supply of any petroleum product ... Section 376.301(11), Florida Statutes.

The Third District Court of Appeal rejected the Department's interpretation in Commercial Coating Corporation v. DER, 548 So.2d 677 (Fla. 1st DCA 1989) that mineral spirits was not a "petroleum product" because is was not primarily used as a fuel, but as a solvent. The court focused on two facts: that mineral spirits is a petroleum product, and that it is a liquid fuel. The court therefore reversed an order which had rejected an application to participate in the early detection incentive program for cleanup of contaminated sites under the Super Act. Similarly, used oil is used as a fuel, and the same analysis applied in Commercial Coating Corporation leads to a finding of eligibility here. The contamination resulting from the leaks and spills of used oil is quite similar to the contamination which would result from leaks or spills of virgin oil or other petroleum products which would clearly be covered under Section 376.3071, Florida Statutes.

Although not directly on point, the decision of the First District Court of Appeal in Puckett Oil v. DER, 459 So.2d 720 (Fla. 1st DCA 1989) (on rehearing) also indicates some judicial dissatisfaction with the Department's reading of the Super Act to exclude the cost of cleanup of used oil from service stations. The spills of used oil Petroleum Products Corporation collected here also qualify for cleanup under the Super Act.

RECOMMENDATION

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

RECOMMENDED that the application of Petroleum Products Corporation for eligibility to participate in the cleanup program funded by the Inland Protection Trust Fund be granted.

DONE and ENTERED this 9th day of July, 1990, at Tallahassee, Florida.

July 9, 1990

WILLIAM R. DORSEY, JR.
Hearing Officer

APPENDIX
Rulings on Findings of Fact proposed the Petitioner:

As will be obvious, the proposed order submitted by Petroleum Products Corporation comported closely with the Hearing Officer's view of the evidence, and with some modification was essentially adopted as proposed.

1. Adopted in Finding of Fact 3.

2. Adopted in Finding of Fact 3.

3. Adopted in Finding of Fact 4.

4. Adopted in Finding of Fact 4.

5. Adopted in Finding of Fact 5.

6. Adopted in Finding of Fact 6.

7. Adopted in Finding of Fact 6.

8. Adopted in Findings of Fact 7 and 8.

9. Adopted in Finding of Fact 8.

10. Adopted in Findings of Fact 9 and 10.

11. Adopted in Finding of Fact 10, to the extent necessary.

12. Adopted in Finding of Fact 11.

13. Adopted in Finding of Fact 12.

14. Adopted in Finding of Fact 13.

15. Adopted in Finding of Fact 14.

***13** 16. Adopted in Finding of Fact 15.

17. Generally adopted in Finding of Fact 16.

18. Rejected as subordinate.

19. Rejected as unnecessary and subordinate.

20. Adopted in Finding of Fact 17.

21. Adopted in Finding of Fact 18.

22. Adopted in Finding of Fact 19.

23. Adopted in Finding of Fact 20.

24. Generally adopted in Finding of Fact 21.

25. Adopted in Finding of Fact 22.

26. Adopted in Finding of Fact 23.

27. Adopted in Finding of Fact 24.

28. Adopted in Finding of Fact 24.

29. Adopted in Finding of Fact 24.

30. Adopted in Finding of Fact 28.

31. Adopted in Finding of Fact 29.

32. Adopted in Finding of Fact 30.

33. Adopted in Finding of Fact 31.

34. Adopted in Findings of Fact 31 and 32.

35. Adopted in Finding of Fact 33

36. Rejected as repetitious of Finding of Fact 6.

37. Rejected, see Findings of Fact 25 and 26.

38. Adopted in Finding of Fact 24.

39. Adopted in Finding of Fact 34.

40. Adopted in Finding of Fact 35.

41. Adopted in Finding of Fact 36.

42. Adopted in Finding of Fact 37.

43. Adopted in Finding of Fact 38.

44. Adopted in Finding of Fact 39.

45. Adopted in Finding of Fact 40.

46. Adopted in Finding of Fact 41.

47. The spreading theory is rejected in Findings of Fact 7 and 8.

48. Rejected as unnecessary.

49. Adopted in Finding of Fact 42.

50. Adopted in Finding of Fact 42. See also the stipulation of the parties entered as Exhibit 22.

51. Rejected as unnecessary.

Rulings on Findings of Fact proposed by the Department.

1. Adopted in Finding of Fact 1.

2. Adopted as modified in Finding of Fact 2.

3. Discussed in the Conclusions of Law, see page 20.

4. Adopted in Finding of Fact 3.

5. Adopted in Finding of Fact 3.

6. Implicit in Findings of Fact 3 and 6.

7. Adopted in Finding of Fact 6.

8. Adopted in Finding of Fact 5.

9. Adopted in Finding of Fact 4.

10. Adopted in Finding of Fact 4.

11. Rejected as unsupported by the transcript references given.

12. Adopted in Finding of Fact 5.

13. Adopted in Finding of Fact 5.

14. Adopted in Finding of Fact 5

15. Rejected as unnecessary.

16. Generally rejected; see Finding of Fact 6 concerning the filling of the disposal pits.

17. While some pockets of sludge remain at the site of the pits, the volume is difficult to determine. In an absolute sense, those pockets may contain a substantial amount of sludge, but on a comparative basis, by far the greatest part of the sludge was removed.

18. Rejected as unnecessary.

19. Generally adopted in Finding of Fact 32(1), but see the final sentence of (1).

20. Generally adopted in Findings of Fact 25, 28, and 34.

21. Generally adopted in Finding of Fact 28, since the recycling facility and storage tanks were on the southern part of the property.

22. Rejected as unnecessary.

***14** 23. Adopted in Finding of Fact 26.

24. Adopted in Finding of Fact 26.

25. Adopted in Finding of Fact 3.

26. Implicit in Finding of Fact 11.

27. Adopted in Finding of Fact 11.

28. Adopted in Finding of Fact 4.

29. Rejected because the process tanks necessarily store the product being processed, serving as a vessel to contain the product.

30. Rejected, see Finding of Fact 3 with respect to the turnover in the volume of used oil processed at the facility. Only about 10 percent of the oil was reprocessed as lubricating oil. This is more significant than the volume of the tanks. See also Tr. 24 with respect to the storage capacity, and Finding of Fact 11.

31. Rejected as unnecessary.

32. Rejected because the surficial drainage has probably been changed by the filling and regrading of the property in preparation for building the warehouses. See Finding of Fact 6. The current surficial flow says little about the flow when the facility operated in the late 1950's and throughout the 1960's.

33. Adopted in Findings of Fact 15 through 19.

34. Adopted in Findings of Fact 17 and 18.

35. Adopted in Finding of Fact 17.

36. Generally rejected, the evidence is persuasive that about 50,000 gallons of oil were lost in the 1966 fire. (See Tr. 36–37.)

37. Adopted in Finding of Fact 25.

38. Adopted in Finding of Fact 26.

39. Adopted in Finding of Fact 26.

40. Adopted in Finding of Fact 26.

41. Adopted in Finding of Fact 27.

42. Adopted in Finding of Fact 27.

43. Rejected as unnecessary.

44. Adopted in Finding of Fact 27.

45. Adopted in Finding of Fact 27.

46. Adopted in Finding of Fact 27.

47. Adopted in Finding of Fact 27.

48. Adopted in Finding of Fact 27.

49. Rejected, the free product covers approximately one-half acre.

50. Rejected, the more persuasive evidence is the 103,000 gallons estimated by Mr. McDonnell. See Finding of Fact 31.

51. Rejected as unnecessary.

52. Rejected as unnecessary.

53. See Findings of Fact 28 and 34.

54. Rejected because it is unlikely that sludges are separating in the former sludge lagoon. See Finding of Fact 30. The source of the oil is more likely the substantial loss of oil which occurred from the fires and from leaks over the years which is now floating above the ground water.

55. Generally adopted in Finding of Fact 28.

56. Generally adopted in Finding of Fact 28.

57. Rejected as unpersuasive.

58. Rejected, the source of the free product is not leaching from the disposal pit, but the oil from over flows and leaks during operation as well as large inundations during fires.

59. Adopted in Finding of Fact 4.

60. Adopted in Finding of Fact 4.

61. Adopted in Finding of Fact 4.

62. Rejected, see Finding of Fact 30.

63. Rejected because oil does not separate from the sludge.

64. Rejected for the reason given for rejecting Finding of Fact 63.

***15** 65. Rejected, the seepage is not the result of separation in the disposal pits, but from the plume of free product in the ground above the ground water.

66. Rejected as unnecessary, but the similarity of the oil seeping from the sludge pit area to waste oil is consistent with its source as leaks and spills incident to fires.

67. Rejected because the sludge does not separate.

68. Rejected because the sludge does not separate.

69. Rejected because the sludge does not separate, see Finding of Fact 30.

70. Rejected as unnecessary; obviously as there is no more storage, so there is no more source for leaks or spills.

71–73. Discussed in Finding of Fact 30.

74. Rejected because liquid product will not accumulate.

75. Rejected because the sludge does not separate.

76. Adopted in Finding of Fact 32(1).

77. Adopted in Finding of Fact 32(5).

78. Adopted in Finding of Fact 32(1).

79. Rejected for the reason stated in Finding of Fact 32(5).

80. Rejected for the reason stated in Finding of Fact 32(5).

81. Rejected as unnecessary and for the reason stated in Finding of Fact 32(5).

82. Adopted in Finding of Fact 32(1), which is consistent with the source of the free product being used oil rather than separation from sludge remaining onsite.

83–84. Rejected as unnecessary.

85. Rejected as unnecessary.

86. Rejected because the testimony of Mr. McDonnell has been accepted.

87. Rejected as unnecessary.

88. Adopted in Finding of Fact 27.

89. Rejected as redundant.

90. Adopted in Finding of Fact 34.

91. Adopted in Finding of Fact 34.

92. Implicit in the finding that lead is a contaminant found in used oil. See Finding of Fact 34.

93. Adopted in Finding of Fact 4.

94. Rejected as unnecessary.

95. Generally adopted in Finding of Fact 34.

96. Generally adopted in Finding of Fact 34.

97. Adopted in Finding of Fact 35.

98. Rejected as unnecessary.

99. Rejected as unnecessary; see also, Finding of Fact 6.

100. Adopted in Finding of Fact 32(1).

101. Rejected as unnecessary.

102. Rejected as unnecessary.

103. Rejected as unnecessary, although there were disposal pits in the north and eastern parts of the property.

104. Adopted in Finding of Fact 34 with respect to location, but the testimony with respect to spreading of the sludge is rejected. See Finding of Fact 7.

105. It is unlikely that sludge was spread over the site. The more likely explanation for the appearance of sludge in the lithologic logs for the southern end of the site is that the disposal lagoons periodically overflowed after heavy rains and provided a mechanism for the active transport of sludge out of the disposal pits into some areas on the southern end of the site. Apparently the northern area now occupied by the warehouses was higher, because no sludge was found in observation wells 4, 5 and 19.

106. Rejected, page 41 of DER's Exhibit 3 shows no sludge at observation well 5, which the proposed finding implies.

***16** 107–112. Generally rejected because the testimony with respect to the surface flow from the tank area being to the south is rejected because the grading of the property as the warehouses were built likely changed the contour of the land. Mr. Levin's testimony was not particularly strong; for example, at page 25 of his prefiled direct testimony he states, “And for the shallow soil contamination I would still have to lean towards the fact that the materials were mixed and spread.”

113–114. The sludge contamination is not the predominant or source of contamination. Rather, it is the oils which floated across the land and were carried into the soil and resulted from the leaks and spills.

115–120. Generally accepted in Finding of Fact 36, although subordinate to that finding.

121. Generally accepted, although the soil contamination by lead is attributable to leaks and spills from the used oil.

122–124. Rejected as unnecessary.

125. Accepted in Finding of Fact 25.

126. Accepted in Finding of Fact 38.

127–128. Subordinate to Findings of Fact 36, especially the last sentence, and 38.

129. Subordinate to Finding of Fact 39.

130. Subordinate to Finding of Fact 39, especially the last sentence.

131. Rejected as unnecessary.

132–134. Accepted in Finding of Fact 39.

135. Rejected because the soil contamination is the result of leaks and spills of oil.

136–137. Rejected, it is more likely that the neutral pH of the ground water is the result of the essentially neutral contaminant, the used oil.

138. Rejected as unnecessary.

139. Rejected as unnecessary, although consistent with Finding of Fact 39 that the lateral extent of ground water contamination mirrors the soil contamination which has resulted from leaks and spills.

140–141. The predominant source of contamination is leaks and spills.

142. Rejected, the area affected by the leaks and spills is large, due especially to the fires and consequent loss of large amounts of oil from tanks. See Finding of Fact 41.

143–144. Rejected as irrelevant and unnecessary.

145. Although true, not relevant.

146–148. Rejected, whether the Environmental Protection Agency is correct or not in its assessment is not at issue here. This site was contaminated by used oil.

149–150. Although true, not relevant.

151. Implicitly accepted in that no finding with respect to “bias” has been made.

152. Rejected as legal argument.

153. Rejected because the predominate source of contamination is an eligible source.

154. Rejected, but the source here falls within the statutory directive.

155. Rejected. The site here is predominantly contaminated by used oil, which is eligible. The eligible portion is not a minor part of the entire of the contamination.

Exhibit II

EXCEPTION TO RECOMMENDED ORDER

Respondent State of Florida Department of Environmental Regulation, pursuant to Rule 17–103.200, F.A.C. files the following exception to the Hearing Officer's Recommended Order entered in this case, and states:

EXCEPTION NO. 1

***17** The Hearing Officer in his finding of fact Number 21, and in the Conclusions of Law in the third paragraph on page 20 and the first paragraph of page 21 of the Recommended Order, has concluded that lubricants are "petroleum products" eligible for cleanup funding from the Inland Protection Trust Fund. The Hearing Officer's findings and conclusions on that point are directly contrary to the language of the enabling legislation and the relevant decisional law.

The term "petroleum product" is defined as "... any liquid fuel commodity made from petroleum." A lubricant is not a fuel but is rather used to "... reduce friction, heat and wear...." Webster's III New Riverside University Dictionary (1984). When used oil is rerefined for the specific purpose of use as a lubricant, it does not qualify as a fuel or, correspondingly, as a petroleum product.

The Hearing Officer concluded that "[t]he Department has already found that used oil is a petroleum product within the meaning of the statute when it is being recycled." Recommended Order at 21. That statement was based on the Department's Final Order in Puckett Oil Company v. DER, 10 FALR 5525 (1988), reversed on other grounds, 549 So.2d 720 (Fla. 1st DCA 1989). The Hearing Officer misapprehended the Order in Puckett Oil, which stressed the functional use aspect of the recycled used oil, and which held:

"Petroleum product," however, can include used oil, but only if it is being utilized, to a significant degree, either by the owner or the ultimate user, as a liquid fuel commodity. Eligibility for reimbursement under the SUPER Act can cover spills from used oil, but only if used oil meets the functional definition of petroleum product and only if the contamination results from spills related to its storage in petroleum storage systems.

Id. at 5530.

In addition, the Recommended Order failed to consider the case of Red Top Sedan v. DER, 12 FALR 214 (September 14, 1989), aff'd per curiam __ So.2d __ (Fla. 1st DCA June 22, 1990). In that case, the Hearing Officer found that "[m]otor oil and transmission fluid are used to lubricate engines and transmissions. They are not fuels."

Finally, the Hearing Officer's reliance on Commercial Coatings Corporation v. DER, 548 So.2d 677 (Fla. 3rd DCA 1989) is misplaced. That case is limited to the facts of that specific case, which addressed whether or not solvents, rather than lubricants, were petroleum products. The Third District Court of Appeal held that so long as a solvent is capable of being burned, it is a fuel for purposes of construing "petroleum product." The Florida Legislature immediately recognized the fallacy of the DCA's opinion and legislatively "fixed" the court's overly broad construction of the term "petroleum product" by providing that solvent contamination is not eligible for funding from the IPTF. See Section 10, Chapter 90–98, Laws of Florida. The Department believes that the Legislative action taken in Chapter 90–98 confirms the position that petroleum derivatives which are not used as fuels are not "petroleum products."

***18** In conclusion, the Hearing Officer erred in finding and concluding that lubricants are "petroleum products," and requests that the Secretary correct that improper construction.

In this case, that correction should have little if any effect on the overall result of the Recommended Order. In Finding of Fact No. 3, the Hearing Officer found the amount of used oil recycled as a lubricant at the petroleum products facility to be small. Under Red Top Sedan, supra, the Department examines the eligible and ineligible sources of otherwise indistinguishable plumes in terms of predominance. Given the facts as found by the Hearing Officer, the fuel portion of the recycled oil appears to be the predominant source.

For the reasons set forth herein, the Department requests that the Secretary accept the exception contained herein and enter a Final Order consistent with the exception.

Respectfully submitted,

E. GARY EARLY, Assistant General Counsel

1990 WL 142708 (Fla.Dept.Env.Reg.)