STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STEPHEN OBER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 93-3313
	)	
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal hearing before P. Michael Ruff, duly-designated Hearing Officer of the Division of Administrative Hearings, on February 22, 1996, in Daytona Beach, Florida.

APPEARANCES

For Petitioner: Robert J. Riggio, Esquire
Owens & Riggio, P.A.
125 North Ridgewood Avenue
Daytona Beach, Florida 32114

For Respondent: W. Douglas Beason, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the contamination at issue regarding the underground storage tanks was the result of a release of a "petroleum product or products" from a "petroleum storage system".

PRELIMINARY STATEMENT

This cause arose upon the Respondent's denial of an application for reimbursement of costs associated with the initial remedial action program task performed at the Petitioner's facility, known as DEP Facility 64-9100172. The denial was predicated upon the Respondent's belief that the contamination resulting at the site was not the result of the release of a "petroleum product", as that term is defined in the statutory authority cited below, and that it was not released from a "petroleum storage system". The Respondent's position is that the contamination at the site resulted from surface spillage and improper disposal of petroleum products.

The Petitioner contested that decision and sought a formal proceeding, pursuant to Section 120.57(1), Florida Statutes. Ultimately, the cause was assigned to the undersigned Hearing Officer for resolution.

The cause came on for hearing as noticed. At the hearing, the Petitioner presented 22 exhibits, which were admitted into evidence, with the exception of Petitioner's Exhibits 8 and 9, which were not moved. The Petitioner's Exhibit 22 was admitted as corroborative or explanatory hearsay only, pursuant to Section 120.58, Florida Statutes. The Petitioner presented the testimony of Edward Allen Smith, a state-certified pollution specialty contractor and general contractor, who was project manager for the cleanup effort at the subject site.

The Respondent presented five exhibits, four of which were admitted into evidence. The Respondent's Exhibit 5 was not admitted. The Respondent presented the testimony of Roger Register, an Engineer IV in the Bureau of Waste Cleanup of the Department of Environmental Protection; and Brian King, a Petroleum Cleanup Reimbursement Section Environmental Specialist III.

Upon conclusion of the proceeding, the parties elected to avail themselves of the right to submit Proposed Recommended Orders, requesting an extended period of time to make those submittals. Consequently, the time constraints for rendition of the Recommended Order were waived by the parties. The proposed findings of fact and conclusions of law submitted by the parties have been treated in this Recommended Order and again in the Appendix attached hereto and incorporated by reference herein.

FINDINGS OF FACT

1. The Petitioner is the owner of real property located at 726 North Beach Street, Daytona Beach, Florida, also known as DEP Facility No. 64-9100172. The Petitioner has been the owner of this site from 1982 to the present. From approximately 1984 and 1988, it was leased to a Mr. Jack Delaney. Apparently, during that time or before, the site was used as an AAMCO transmission repair shop and automobile repair facility.

2. The Respondent, Department of Environmental Protection (DEP, Department), is an agency of the State of Florida responsible, in pertinent part, for the administration of Florida's Abandoned Tanks Restoration Program. Through an agreement with Volusia County, Florida, the county where the subject site is located, the Department has delegated to the Volusia County Environmental Control Division inspection and regulatory authority for purposes of cleanup of sites contaminated by petroleum, petroleum products or hydrocarbons.

3. The facility in question included two 1,000-gallon underground storage tanks and three 550-gallon underground storage tanks (UST's). All of the tanks, when in service, had contained petroleum products of one form or another. The tanks at the front or "street-side" end of the facility property, tanks one and five, most likely contained gasoline, when in service, although at the time of inspection and remedial action, the tanks were filled with water. All of the storage tanks at the facility were removed under the supervision of the Volusia County environmental regulatory agency. The tanks were properly disposed of by a qualified subcontractor, and the contaminated soil at the site was removed and stored in a segregated, protected fashion, until shipment to a thermal processor to be burned and thus cleansed of its petroleum-related pollutants.

4. The Volusia County Environmental Control Division made an inspection of the subject site and on September 10, 1987, informed Mr. Delaney, the lessee, that a considerable amount of soil contamination, due to petroleum or petroleum products, was present on the site. The Department maintains that the finding by the county agency was that the soil contamination was due to improper surface disposal of used oils. Mr. Ed Smith, who testified for the Petitioner, has been involved as a petroleum de-contamination contractor for such sites hundreds of times and was present throughout the cleanup operations conducted at the subject site. He established that, indeed, there were spillages of used and waste oils and petroleum products at the site but that a great deal of the contamination also resulted from underground leakage from the storage tanks, or some of them. Preponderant evidence was not adduced by the Department, merely through its reliance upon DEP Exhibit 1, Request No. 59, to show that the contamination at the site solely resulted from surface spillage, in consideration of the testimony of Mr. Smith, which is accepted.

5. On or about September 19-20, 1990, five underground storage tanks were removed from the facility site by Hydroterra Environmental Services, Inc., a contractor at the site. Thereafter, an underground storage tank closure report (closure report) for the AAMCO transmission facility was prepared by Hydroterra Environmental Services, Inc. That report is in evidence as the Petitioner's Exhibit 20. The report and testimony reveals that a total of three 550-gallon underground storage tanks were removed from the facility. There were two 550-gallon underground storage tanks located in front of the facility, known as tanks one and five. When those two tanks were removed, both were found to contain water. It is not clear what originally was stored in those tanks, but they were, in all likelihood, utilized for the storage of gasoline. The closure report concerning tank one and tank five reveals that the fuel-dispensing capability of those tanks was discontinued many years ago.

6. One of the tanks, tank one, leaked. It had holes caused by corrosion. An environmental consultant, however, utilizing an organic vapor analyzer (OVA), performed soil-monitoring tests during the excavation and removal of these two 550-gallon UST's, which were thought to have formerly contained gasoline (tank one and tank five). His single OVA reading at that site showed a "0 PPM" (parts per million) for that sampling location associated with the excavation of tank one and tank five near the front of the AAMCO facility. The environmental consultant also obtained a groundwater sample during excavation and removal of those two tanks. The sample was analyzed for the presence of benzene, ethylbenzene, toluene, and xylene (BETX). The parameters for BETX are utilized to determine the presence of petroleum contamination. The analytical results for that sample for the tank one and tank five excavation site indicate that the parameters for those hydrocarbon compounds were all below detectable limits. Analytical results for the water sample, however, did indicate the presence of chlorobenzene. Chlorobenzene is associated with solvents, is an aromatic hydrocarbon compound and is a form of petroleum, that is, it is made from crude oil derivatives.

7. With regard to these two tanks and, indeed, all of the tanks excavated, there was an absence of "free product" on the water table. That is, gasoline, waste oil or other forms of petroleum or petroleum products were not separately identified and existing on the surface of the groundwater table.

8. Upon visual inspection, as shown by the Petitioner's Exhibit 20, the closure report, the testimony of Mr. Smith, as well as the photographs in evidence, tanks one, five, four, and six had multiple holes from small "pinhead size" to one inch in diameter. The tanks thus would have leaked any contents

contained therein. Upon excavation of the tanks from the site, they were cleaned, de-commissioned, and transported to Jacksonville, Florida, to a subcontractor for disposal as scrap. Tanks two and three were determined to be intact, with no apparent holes.

9. Tank one had one or more holes. The evidence shows that that tank was suspected of containing gasoline during its useful life, although when it was excavated, it was found to be full of water. The OVA and groundwater tests taken in conjunction with the removal of tanks one and five from the site near the front of the facility do not show excessive contamination, however. This is corroborated by the testimony of Mr. Smith, testifying for the Petitioner, who is a licensed pollutant storage tanks specialty contractor and a general contractor. He has removed hundreds of underground storage tanks and conducted many such cleanup projects. He himself supervised the removal of the tanks and was on site virtually every day. With regard to the removal site for tanks one and five, which were in close proximity to each other, he confirmed that he felt that the site was "clean". Thus, it has not been demonstrated by preponderant evidence that tanks one and five contributed to the contamination of groundwater and soil at the site.

10. In the rear of the AAMCO transmission facility, there were two 1,000-gallon UST's. One of them had been used for storage of waste oil and transmission fluid (tank two). The second 1,000-gallon UST, tank three, had been used for storage of new transmission fluid. Tanks two and three were located on either side of a concrete apron at the rear door of the transmission shop. Tank two was excavated separately from tanks three, four and six. There is no evidence that tanks two and three, the two 1,000-gallon tanks, had holes or other sources of leakage.

11. During the excavation and removal of tank two, an OVA was used to perform the soil monitoring tests. A single reading of 328PPM was recorded for the sampling location associated with the excavation and removal of tank two. A groundwater sample (MW-SB No. 3) was obtained from the tank pit, where tank two was excavated and removed. That sample indicates that there was a "odor of solvents". The analytical results for that groundwater sample indicate an analysis for benzene, ethylbenzene, toluene and xylene, showing that the parameters for benzene and ethylbenzene were below detectable limits. However, the analytical results for that sample indicate that chlorobenzene and 1,4-dichlorobenzene were above detectable limits, with significantly-elevated readings, representing excessive contamination with these constituents. These are consistent with the presence of aromatic solvents. Such compounds are hydrocarbons, being derived from petroleum.

12. The groundwater sample related to tank three also showed very high levels of xylene, chlorobenzene, and 1,4-dichlorobenzene; volatile, aromatic hydrocarbon compounds derived from petroleum. The excavation pit for tank three yielded a groundwater sample of similar quality, in terms of the odor of solvents and elevated levels of the above-mentioned hydrocarbon compounds associated with solvents.

13. Tank six, a 550-gallon tank, was located immediately adjacent to and in close proximity to tank three, between tank three and the concrete apron at the rear door of the transmission shop. It contained water at the time it was excavated and inspected. However, it had been used for storage of petroleum or petroleum products of unknown nature. Because of the nature of the business located at the site, the petroleum products contained in the other nearby tanks and because of the petroleum products saturating the soil in the area

immediately surrounding and beneath the tank, it is inferred that the tank contained waste oil, transmission fluid, or solvents at various times and occasions.

14. The excavation for tanks three and six, as well as "tank No. four", which was actually the 55-gallon oil and water separator, was one continuous excavation. The water sample taken with regard to the location of tank six shows significantly-elevated levels of chlorobenzene, 1,4-dichlorobenzene, and xylene. The Department's witness, Mr. Register, acknowledged that elevated levels of pollutants in the pit associated with tanks four, three and six were consistent with the presence of solvents and waste oil or "oils and greases".

15. Mr. Smith, the certified pollution specialty contractor supervising and conducting the project, described in his testimony how one can recognize contaminated soil in the field and that soil is saturated when one can squeeze petroleum compounds out of the soil with the hand. This shows excessive contamination of soils at such a site, as was acknowledged by Mr. Register, the engineer for the Bureau of Waste Cleanup for the Department, who testified. Mr. Smith thus established that the soils in the pit at the rear of the facility were saturated with petroleum or petroleum products. These were derived from waste oils and greases, consisting of waste oil and transmission fluid, as well as solvents. The pollutants leaked from tanks six and four, although Mr. Smith acknowledges in his testimony that tank four is not really considered to be a storage facility but, rather, a 55-gallon drum used as an oil/water separator, connected by a clay pipeline to a catch basin immediately in the rear of the apron and rear door of the building.

16. In summary, through Mr. Smith's testimony, it was established that there was excessive contamination at the site, as shown by the saturation of the soils in the excavation pits from which the tanks were removed, in the manner described above. Under Mr. Smith's supervision, all appropriate remedial action was done at the site, all contaminated soil was removed and cleansed at an appropriate thermal treatment facility. The site was declared "clean" by the county agency referenced above, which had supervision of the project under its agreement with the Department.

17. The initial remedial action task undertaken by the Petitioner, as shown by Mr. Smith's testimony, included removal of excessively-contaminated soils, as defined under Section 62.770.200(2), Florida Administrative Code, concerning the excavations at the rear of the transmission shop. Tank six is the only storage tank shown to have been leaking at the rear of the shop, but the spread or diffusion rate and area of contamination which leaked from that tank through the excavation area is not precisely definable. In any event, a significant portion of the soil in the excavation area at the rear of the transmission shop, including that occupied by tank six, was shown to be excessively contaminated and much of it emanated from tank six, especially evidenced by its central location in the contaminated portion of the site. Removal of that contaminated soil was part of the initial remedial action task.

18. Likewise, the removal of the tanks was part of the performance of the initial remedial action task. In fact, all of the excess contamination could not be removed by removal of the soil without removing the tanks first, to get access to the excessively-contaminated areas beneath the surface grade. There is, however, no evidence that the initial remedial action task, with regard to each tank and tank site, which included removal of the tanks and excessively-contaminated soils, included any necessity to recover "free product" with regard to any of the tanks or tank locations.

19. Finally, it is shown that transmission fluid and waste oil, as well as the other, solvent-related constituents of the contamination at the site, are petroleum or petroleum products. They can be, and are used, as a mixture amounting to a "liquid fuel commodity made from petroleum" and such waste petroleum products are often used in Florida, particularly for boiler fuel to fire industrial-type boilers. These compounds found at the site are both petroleum and petroleum products and are hydrocarbons, as defined in Section 376.301, Florida Statutes. It was thus demonstrated that the contamination at the facility was the result of a discharge of petroleum products, from a petroleum storage system, in the manner and for the reasons delineated more particularly above.

20. On or about January 30, 1991, the Petitioner filed an abandoned tank restoration program application form with the Department. The Department issued the Petitioner an "order of eligibility" under that program for the abandoned tank restoration, which final order was entered on August 16, 1991. That order of eligibility is limited to "contamination related to the storage of petroleum products, as defined in Section 376.301(10), Florida Statutes.

21. On February 14, 1992, the Petitioner filed a reimbursement application for all allowable costs with the Department. On or about April 28, 1993, a "final order of determination of reimbursement" for allowable costs was issued by the Department, which denied all reimbursement of cleanup costs associated with contamination of the property. That action was the result of the Department's position that the contamination resulted from improper disposal of petroleum products at the AAMCO transmission facility and not due to contamination of the site from the storage tank system.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. Section 120.57(1), Florida Statutes.

23. Section 376.301(20), Florida Statutes, provides, in pertinent part, as follows:

> (20) 'Petroleum' includes:
> (a) Oil, including crude petroleum oil and other hydrocarbons, regardless of gravity, which are produced at the well in liquid form by ordinary methods and which are not the result of condensation of gas after it leaves the reservoir; and
> (b) All natural gas, including casing head gas, and all other hydrocarbons not defined as oil in paragraph (a).
> (21) 'Petroleum product' means any liquid fuel commodity made from petroleum, including, but not limited to, all forms of fuel known or sold as diesel fuel, kerosene, all forms of fuel known or sold as gasoline, and fuels containing a mixture of gasoline and other products, excluding liquefied petroleum gas and American Society for Testing and Materials (ASTM) grades number 5 and number 6 residual

> oils, bunker C residual oils, intermediate fuel oils (IFO) used for marine bunkering with a viscosity of 30 and higher, asphalt oils, and petrochemical feed stocks.
>
> (22) 'Petroleum storage system' means a stationary tank not covered under provisions of Chapter 377, together with any on-site integral piping or dispensing system associated therewith, which is used, or intended to be used, for the storage or supply of any petroleum product. Petroleum storage systems may also include oil/water separators, and other pollution control devices installed at petroleum product terminals as defined in this chapter and bulk product facilities pursuant to, or required by, permits or best management practices in an effort to control surface discharge of pollutants. Nothing herein shall be construed to allow a continuing discharge in violation of Department rules. . . .
>
> (29) 'Storage system' means a stationary tank not covered under the provisions of Chapter 377, together with any on-site integral piping or dispensing system associated therewith, which is or has been used for the storage or supply of any petroleum product, pollutant or hazardous substances defined herein, and which is registered with the Department of Environmental Protection under this chapter or any rule adopted pursuant hereto.

24. Section 376.305(7), Florida Statutes, provides as follows:

> (7) The legislature created the abandoned tank restoration program in response to the need to provide financial assistance for clean-up of sites that have abandoned petroleum storage systems. For purposes of this subsection, the term 'abandoned petroleum storage system' shall mean any petroleum storage system that has not stored petroleum products for consumption, use, or sale since March 1, 1990. The Department shall establish the abandoned tank restoration program to facilitate the restoration of sites contaminated by abandoned petroleum storage systems. . . .

25. The subject application was filed under authority of this above statutory provision and the related rules contained in Chapter 62-770, Florida Administrative Code.

26. Rule 62-770.160, Florida Administrative Code, provides, in pertinent part:

> Rule 62-770.160 Applicability.
> (1) The cleanup criteria contained in this rule shall apply to any cleanup of a site contaminated with petroleum or petroleum products . . . whether conducted by an owner, operator, response action contractor, local government or the Department.

27. Here, the cleanup of the subject site was accomplished by the owner, the response action contractor, and local government acting through authority of its agreement with the Department.

28. Rule 62-770.200, Florida Administrative Code, provides, in part, as follows:

> 62-770.200 Definitions.
> All words and phrases defined in Section 376.301, F.S., shall have the same meaning when used in this chapter unless the context clearly indicates otherwise. The following words and phrase as used in this chapter shall, unless the context clearly indicates otherwise, have the following meanings:
> (1) 'Contamination' or 'contaminated' means a discharge of petroleum or petroleum products in the surface waters, groundwaters or upon the land, in quantities which may result in a violation of Chapter 62-3, Florida Administrative Code, water quality standards.
> (2) 'Excess soil contamination' or 'excessively contaminated soil' means soil saturated with petroleum or petroleum products or soil which causes a total hydrocarbon reading of 500PPM for gasoline analytical group (or 50PPM for kerosene analytical group or mixed product analytical group). This reading shall be obtained on an organic vapor analysis instrument with a flame ionization detector in the survey mode upon sampling the headspace in a half-filled, 16-ounce soil jar.

29. The preponderant evidence of record adduced by the Petitioner, and corroborated to some extent by Mr. Register, establishes that excessively-contaminated soil was present at the site because the soil at the areas in the rear of the facility, where excavations were done for the tank removal, was saturated with petroleum or petroleum products. This is the alternative means embodied in the above-quoted rule of determining excessively-contaminated soil, stated disjunctively from the standard in the rule concerning total hydrocarbon readings. There is no question that excessively-contaminated soil was present.

30. The contamination was caused, according to the preponderant evidence, by waste oil and transmission fluid, as well as hydrocarbon, petroleum-based solvents. Waste oil and transmission fluid are commonly used as fuel

commodities in Florida, predominantly as boiler fuel. These findings are largely predicated on the testimony of Mr. Smith, who was best able to testify concerning the nature of the products which leaked into the soils and groundwater and the saturated nature of the soils at the subject site. Mr. Smith supervised the entire project and was on the site practically every day, making his observations. No one from the Department was present during cleanup of the site, and the Department has admitted that no one from the Department visited the site until the day before hearing, approximately five and one-half years after the tanks were removed and the contamination cleaned up. It has been established that the contaminants referenced in the above Findings of Fact constitute petroleum products and petroleum because the waste oils, transmission fluid and the aromatic solvents are all hydrocarbons and are derived from petroleum. Thus, they meet the above statutory definition. See, Commercial Coating Corporation v. DER, 548 So.2d 677 (Fla. 3d DCA 1989).

31. Rule 62-773.500(2), Florida Administrative Code, provides, in pertinent part:

> 62-773.500 Program Tasks.
> (2) For sites at which Chapter 62-770, F.A.C., controls site rehabilitation, the following shall be program tasks:
> (a) Initial, remedial action (IRA):
> 1. This task shall include any action, including initial investigation and assessment, necessary to:
> a. Recover free product without depressing the groundwater table;
> b. Remove and treat or dispose excessively-contaminated soil as defined in Rule 62-770, F.A.C., from above the groundwater table; or
> c. Abate an imminent hazard.
> 2. Unless approved in writing by the Department as an alternative initial remedial action procedure pursuant to Rule 62-770, F.A.C., this program task shall not include any activities associated with:
> a. Petroleum storage system removal performed prior to July 1, 1992, if not integral to the initial remedial action.

32. In the instant situation, the preponderant evidence adduced by the Petitioner and the above findings of fact establish that although no free product was recovered from the groundwater table, it was necessary to remove, treat and dispose of excessively-contaminated soil, as defined in the above rule, from above the groundwater table. That is a proper program task of an initial remedial action, for purposes of the above-cited rule.

33. Although the Department takes the position that the removal of the tanks was not integral to the performance of the initial remedial action task, in fact, the evidence establishes that removal of the tanks and, therefore, the petroleum storage system, was necessary in order to access and adequately remove some 200 tons of contaminated soil from above the groundwater table, in compliance with the delineation of the program task for initial remedial action. The above statutes and rules clearly indicate that such is a reimbursable action.

34. It was not shown, however, that tank four, which in reality was the oil/water separator, although it was leaking, was part of a petroleum storage system. Consequently, the cost of removal of that item should not be included in reimbursement. The same is true of tanks one and five at the front of the site. Although they had been part of a storage system, even Mr. Smith, in his testimony, acknowledged that their sites were clean and not characterized by contaminated soils in the area around and under the tanks.

35. The tanks at the rear of the site were required to be removed as an integral part of the initial remedial action program and project because the excessively-contaminated soil associated with them, or some of them, could not be successfully accessed and removed without removal of tanks two, three and six, particularly because of their close proximity to each other.

36. In summary, the preponderant evidence of record and above findings of fact establish that the portion of the project involving the removal of contaminated soils and tanks two, three and six is reimbursable under the above-cited authority. Consequently, the costs associated with that portion of the project should be reimbursed to the Petitioner.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses and the pleadings and arguments of the parties, it is

RECOMMENDED that a Final Order be entered by the Department of Environmental Protection awarding reimbursement for the cleanup of DEP Facility No. 64-9100172 in accordance with the considerations, findings and conclusions made above.

DONE AND ENTERED this 29th day of May, 1996, in Tallahassee, Florida.

P. MICHAEL RUFF, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of May, 1996.

APPENDIX TO RECOMMENDED ORDER CASE NO. 93-3313

Petitioner's Proposed Findings of Fact

1-7. Accepted.
8. Rejected, as constituting argument and not a proposed finding of fact.
9-10. Accepted.
11. Accepted, as to those tanks delineated more particularly in the Hearing officer's findings of fact.

12-13. Accepted.
14. Rejected, as subordinate to the Hearing Officer's findings of fact on this subject matter.
15. Accepted.

Respondent's Proposed Findings of Fact

1-2. Accepted.
3. Accepted, but not itself materially dispositive.
4-12. Accepted, but not all of which are materially dispositive.
13-19. Accepted, but not necessarily materially dispositive.
20-23. Accepted.
24-25. Accepted, but not material.
26. Rejected, as subordinate to the Hearing Officer's findings of fact on this subject matter.
27-29. Accepted.
30. Accepted, but not materially dispositive.
31-34. Accepted, but not in themselves materially dispositive.
35-36. Accepted.
37-39. Accepted, but immaterial.
40-45. Accepted, but not in themselves materially dispositive.
46-49. Accepted.
50. Accepted, only as an indication of the Department's position.
51-55. Accepted.
56-64. Rejected, as contrary to the preponderant weight of the evidence and subordinate to the Hearing Officer's findings of fact on this subject matter.
65. Accepted.
66-69. Rejected, as contrary to the preponderant weight of the evidence and subordinate to the Hearing officer's findings of fact on this subject matter, and erroneous as a matter of law.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit to the agency written exceptions to this Recommended Order. All agencies allow each party at least ten days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the Final Order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

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AGENCY FINAL ORDER

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STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

STEPHEN OBER,

Petitioner,

v. OGC Case No. 93-1835
DOAH Case No. 93-3313

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.
_____/

FINAL ORDER

On May 29, 1996, a Hearing Officer with the Division of Administrative Hearings (hereafter "DOAH"), submitted his Recommended Order to the Respondent, Department of Environmental Protection (hereafter "Department"). Copies of the Recommended Order were simultaneously served on the Petitioner Stephen Ober (hereafter "Ober"). A copy of the Recommended Order is attached hereto as Exhibit A. On June 13, 1996, the Department timely filed Exceptions to the Recommended Order. The matter is now before the Secretary of the Department for final agency action.

Background

In 1987, Petitioner was informed that his property at 726 North beach Street, Daytona Beach, Florida (DEP Facility Number 64-9100172), which had been leased for use as an AAMCO transmission repair shop, had become contaminated. In September, 1990, the initial remedial action was undertaken, and in January, 1991, Petitioner filed an Abandoned Tank Restoration Program application form with the Department in accordance with Section 376.305(7), Florida Statutes (F.S.). In August, 1991, the Department issued an order of eligibility for all contamination "related' to the storage of petroleum products." In February,

1992, the Petitioner filed a reimbursement application for the costs associated with performance of the initial remedial action task at the site. In April, 1992, the Department issued its order denying reimbursement of all cleanup costs associated with contamination of the property. The Department's proposed agency action was predicated on its determination that the contamination was not predominantly the result of the release of a petroleum product from a petroleum storage system.

Petitioner timely filed a challenge in accordance with Section 120.57, F.S. A formal administrative hearing was held in this case before DOAH Hearing Officer P. Michael Ruff on February 22, 1996, in Daytona each, Florida. Proposed recommended orders were timely filed by Petitioner and the Department after the completion of the formal hearing.

The Hearing Officer found that the contamination was the result of a release of a petroleum product from a petroleum product storage system, and recommended that the Department reverse its position and award Petitioner reimbursement for most of the costs of remediation. Specifically, the Hearing Officer found that the contamination was primarily the result of releases of transmission fluid, waste oil, and solvents from a 550-gallon underground storage tank and from a 55-gallon drum used for oil/water separation.

There are six storage tanks at this site which are relevant to this action. Tanks one and five were located at the front of the facility, and were found by the Hearing Officer not to have contributed to any contamination at the site. Tanks two and three were located at the rear of the facility, and while contamination was found in their vicinity, inspections showed that these tanks were not leaking and were thus not the source of the contamination. Tank four was actually a 55-gallon drum used as an oil/water separator, and was found to be a source of contamination. Tank six was found to have small holes in it, and the Hearing Officer found that it contained waste oil, transmission fluid, and solvents at various times, and was a source of the contamination at the site. The Hearing Officer also found that although there were spillages of used and waste oils and other materials at the site, "a great deal" of the contamination also resulted from underground leakage from some of the storage tanks.

Section 376.305(7), F.S., provides that the Abandoned Tank Restoration Program is applicable "for cleanup of sites that have abandoned petroleum storage systems." Section 376.301(22), F.S., defines "petroleum storage system" as, in pertinent part, "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(21), F.S., defines "petroleum product" as, in pertinent part, "any liquid fuel commodity made from petroleum." Section 376.301(20), F.S., defines "petroleum" as, in pertinent part, "oil, including crude petroleum oil and other hydrocarbons, regardless of gravity, which are produced at the well in liquid form by ordinary methods and which are not the result of condensation of gas after it leaves the reservoir."

Preface to Rulings on Exceptions

The Department filed several exceptions taking issue with certain findings of fact and conclusions of law In the Recommended Order. As a preface to the rulings on these exceptions, it is appropriate to comment on the standard of review imposed by law on an agency in reviewing recommended orders submitted by DOAH hearing officers.

Under Section 120.57(1)(b)10, F.S., a reviewing agency may reject or modify the conclusions of law and interpretations of administrative rules contained in the recommended order of an administrative hearing officer. However, these statutory provisions mandate that an agency may not reject or modify findings of fact made by a hearing officer, unless a review of the complete record demonstrates that such findings were not based on competent substantial evidence or that the proceedings on which the findings were based do not comply with the essential requirements of law. See Freeze v. Dept. of Business Regulation, 556 So.2d 1204 (Fla. 5th DCA 1990); Florida Department of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987)

The agency reviewing a recommended order may not reweigh the evidence, resolve conflicts therein or judge the credibility of witnesses, as those are evidentiary matters within the province of the hearing officer as the trier of the facts. Heifetz v. Dept. of Business Regulation, 475 So.2d 1277 (Fla. 1st DCA 1985) Consequently, if the record of the DOAH proceedings discloses any competent, substantial evidence to support a finding of fact made by the hearing officer, the reviewing agency is bound by such finding. Bradley, supra, 1123.

Throughout this Order, references to the transcript of the hearing shall be cited as (T. pg. Number). References to Findings of Fact or Conclusions of Law refer to the Recommended Order of the Hearing Officer.

Rulings on Exceptions

Department's Exception Number 1

The Department takes exception to the Hearing Officer's Finding of Fact Number 19 and Conclusion of Law Number 30, in which he finds and concludes that waste oil, transmission fluid, and solvents constitute both "petroleum" and "petroleum products" as defined in Section 376.301, F.S. If these materials, which the Hearing Officer found were the source of contamination at the site, are not shown to be petroleum or petroleum products as defined, then the tanks on the site would not be considered part of a petroleum storage system, and the facility would not be eligible for funds under the Abandoned Tank Restoration Program. As the party asserting the affirmative, Petitioner has the burden of proof of demonstrating entitlement to reimbursement funding. Commercial Coating Corporation v. Department of Environmental Regulation, 10 FALR 5828, 5854 (October 10, 1988), rev'd on other grounds, 548 So.2d 677 (Fla. 3rd DCA 1989)

In Puckett Oil Company v. Department of Environmental Regulation, 10 FALR 5525, 5529-5531 (Sept. 1, 1988), rev'd on other grounds, 549 So.2d 720 (1st DCA 1989), the Department concluded that "petroleum" as defined in Section 376.301, F.S., "is limited to oil from the well, and does not include hydrocarbons that have been refined or otherwise made out of petroleum." see also Commercial Coating Corporation, 10 FALR at 5832. Nonetheless, the Hearing Officer found that waste oils, transmission fluid and the aromatic solvents all meet the definitions of both petroleum and petroleum products because they "are all hydrocarbons and are derived from petroleum." (Conclusion of Law Number 30) The Hearing Officer's definition of "petroleum" is so general as to provide potentially unlimited eligibility, and it is rejected for the same reasons the Department rejected a similar interpretation in Puckett. Waste oil, transmission fluid, and solvents are clearly not "petroleum

"Petroleum product" is defined as "any liquid fuel commodity made from petroleum." The Hearing Officer found that transmission fluid, waste oil, and solvents "can be, and are used, as a mixture amounting to a `liquid fuel

commodity made from petroleum' and such waste petroleum products are often used in Florida, particularly for boiler fuel to fire industrial-type boilers." (Finding of Fact Number 19). He also found that waste oil and transmission fluid "are commonly used as fuel commodities in Florida, predominantly as boiler fuel." (Conclusion of Law Number 30)

The Department argues that, at least in this case, there was no evidence that waste oil and transmission fluid were "commonly" or "often" used as fuels, and no evidence that the waste oil or transmission fluid generated at this site were actually being recycled and used as a fuel. Absent evidence of both these factors, the Department argues, the waste oil and transmission fluid on this site cannot be considered "petroleum products."

Although Section 376.315, F.S., provides that the statutes authorizing the Abandoned Tank Restoration Program should be liberally construed, that does not mean that reimbursement coverage should be unlimited. That the Legislature intended to limit coverage is apparent in its use of the phrase "liquid fuel commodity." To include every material derived from petroleum that can be burned and has at some point been blended and burned in an industrial boiler would render this phrase essentially meaningless. Had the Legislature intended reimbursement funds to be used for cleanups involving any commodity derived from petroleum, it could have simply adopted the definition of "product" found in Section 377.19, F.S., as it did in the definition of "pollutant" in Section 376.301, F.S. "Product" is defined in Section 377.19(11), F.S., as "any commodity made from oil or gas" and specifically includes in the definition "waste oil," "lubricating oils," and "blends or mixtures of two or more liquid products or by-products derived from oil or gas." It is reasonable to conclude that the Legislature intended the reimbursement program to be narrower in scope than other statutes regulating oil and gas resources or pollutant discharge prevention.

The Department concluded in Puckett that the definition of "petroleum product" 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," and if it "is commonly used as a fuel." The Department also noted that "it is critical that site cleanup coverage be limited to used oil being stored for recycling as opposed to simply being discarded." This interpretation was echoed in Red Top Sedan. Inc. v. Department of Environmental Regulation, 12 FALR 214 (Sept. 14, 1989), affirmed, 564 So.2d 1091 (1st DCA 1990)

In Commercial Coating, the Department concluded that mineral spirits were not a "petroleum product" because they were not used as a liquid fuel commodity. The court held that the Department's policy that the definition of "petroleum product" was limited to products whose primary use was as a fuel was incorrect. In that case the court held that mineral spirits were a liquid fuel commodity because they can be produced by distilling gasoline, are burned as fuel in industrial boilers, are sold commercially as charcoal starter fluid, are a component of gasoline fuel used in outboard engines, and were actually used by the applicant as fuel to operate fork lifts.

In accordance with this case law, it is the Department's interpretation that a "petroleum product" is a petroleum-derived commodity which is commonly used as a fuel, and which is actually being utilized to a significant degree as a liquid fuel commodity by the owner or ultimate user, even though its primary use may be other than as a fuel. This definition is a functional one, and depends to a large degree in how a particular material is being managed at a particular facility. If a material is being managed as a waste product, even

though it may be commonly used as a fuel, then it will not be considered a "petroleum product." In this case, it was not proven that any of the contaminants on site were recycled for use as a fuel.

The only evidence regarding the uses of these contaminants was that transmission fluid and waste oil can be burned as a fuel in industrial applications where the purity of a certain blend is not a requirement. (T. pp. 72-73) Petitioner's witness further stated that he didn't know if transmission fluid is "designed for a liquid fuel. I do know that it can be burnt - blended and burned in certain industrial applications." (T. pg. 102) He testified that he didn't know whether the transmission fluid stored in the tanks of this facility was being blended and burned (T. pg. 102) and that he had not discussed disposal practices with the site owners or operators. (T pp. 85-86) A Department witness testified that he saw no evidence in his files that waste oil or transmission fluid was being picked up by a waste oil hauler and being recycled as a fuel. (T. pg. 124) While the evidence would support a finding by the Hearing Officer that waste oil and transmission fluid can be used as fuels, there was no competent substantial evidence to support his findings that waste oil, transmission fluid, or solvents are used "commonly" or "often" in Florida as liquid fuel commodities. More importantly, there was no competent substantial evidence that waste oil, transmission fluid, or solvents were actually used or recycled as fuel sources by the site owner or operator, nor did the Hearing Officer make any findings on this question.

In order to be considered a petroleum product, it must be shown that the material was used or recycled as a fuel commodity. Since there was no finding that the waste oil, transmission fluid, or solvents at this site were ever used or recycled as fuel, nor any evidence to support such a finding, I must reject the Hearing Officer's conclusion (set forth in Finding of Fact Number 19 and Conclusion of Law Number 30) that the waste oil, transmission fluid, and solvents at this site are petroleum products as defined in Section 376.301, F.S. For the reasons cited above, I also reject the Hearing Officer's conclusion that these contaminants constitute petroleum as defined in Section 376.301, F.S. The Department's exception is therefore accepted.

Department's Exceptions Number 2 and Number 3

The Department's Exceptions contain two arguments each labeled Exception No. 2. I presume that the second of these arguments should have been labeled Exception No. 3. Nonetheless, they deal with similar subjects and are thus addressed together.

The Department did not identify in these Exceptions any particular Findings of Fact or Conclusions of Law with which it takes exception. Instead, the Department argues that the Petitioner failed to meet its burden to demonstrate that the contamination at the site was primarily due to the release of petroleum products from a petroleum storage system. The Department argues that since the Hearing Officer found that the contamination was caused by various materials, including solvents, and that the contamination came from various sources, the entire site should be declared ineligible for reimbursement funds. I presume the Department is thus objecting to Conclusion of Law Number 36, in which the Hearing Officer concluded that most of the costs at the site should be reimbursed.

It has long been Department policy that "where contamination is caused by substances both eligible and ineligible for SUPER Act cleanup reimbursement under Section 373.3071(12), Florida Statutes, the appropriate way to interpret

the statutory eligibility criteria is that the entire site is ineligible for reimbursement if a majority of the contamination comes from ineligible sources." Red Top Sedan, 12 FALR at 220. In this case, there is no competent substantial evidence to indicate what contaminants are present in what proportions, nor did the Hearing Officer make any findings in this regard. Even if either the waste oil or transmission fluid at this site were considered a petroleum product, there is no evidence that either was the predominant constituent of the site contamination. There was also no evidence on the degree to which solvents were responsible for contamination. Only if transmission fluid, waste oil, and solvents are all considered petroleum products would the amount of contribution by each material be irrelevant.

Subsequent to Commercial Coatings, Section 376.3071(4), F.S., was amended and now provides that Inland Protection Trust Funds shall not be used "for cleanup of contamination caused primarily by a discharge of solvents as defined in s. 206.9925(6) ." There is no competent substantial evidence in the record regarding the relative amounts of the various contaminants in the soil or ground water at the site. Virtually all of the evidence in the record, as reflected in the Recommended Order, shows that the contamination was the result of a mixture of various petroleum-derived products, including solvents. (Finding of Fact Number 15; T. pp. 131-137) The Petitioner failed to carry its burden of showing that this contamination did not result primarily from a discharge of solvents.

In addition to the fact that the contamination was due to an unspecified mixture of contaminants, there were at least three sources of contamination identified by the Hearing Officer: tank six, a 550-gallon underground storage tank (Finding of Fact Number 15, 17) ; tank four, a 55-gallon drum used as an oil/water separator which is not part of a petroleum storage system (Finding of Fact Number 15; Conclusion of Law Number 34); and spillage not associated with any tank (Finding of Fact Number 4). Coverage under the Abandoned Tank Restoration Program is limited to discharges from a petroleum storage system, and the Petitioner had the burden of showing that contamination at the site came predominantly from such a system.

The Hearing Officer found that "a great deal" of the contamination resulted from underground leakage from some of the storage tanks and was not "solely" attributable to surface spillage. (Finding of Fact Number 4) He found that a "significant" portion of the soil at the back of the facility was contaminated, and "much of it emanated from tank six." (Finding of Fact Number 17) He found that "the spread or diffusion rate and area of contamination which leaked from [tank six] through the excavation area is not precisely definable." (Finding of Fact Number 17) Never did he find, nor is there any competent substantial evidence to support a finding, that a majority of the contamination came from tank six, the only source which might qualify as a petroleum storage system. Again, it is the Department's well-established policy, a policy upheld by the courts, that the entire site is ineligible for reimbursement funding if a majority of the contamination comes from ineligible sources.

I recognize that it may often be difficult for an applicant under the Abandoned Tank Restoration Program to prove with certainty exactly what proportions of what constituent are present in contaminated soils. As noted above, it is the Petitioner's burden to demonstrate that the contamination at this site was the result of a discharge of petroleum products from a petroleum storage system. In this case, however, although the matter was clearly put at issue in the Joint Prehearing Stipulation signed by both parties, the Petitioner made no attempt to distinguish between eligible and ineligible products, or between eligible and ineligible sources.

For these reasons, I accept the Department's exception and reject the Hearing Officer's conclusion that most of the costs at this site are eligible for reimbursement. Even if waste oil and transmission fluid were considered petroleum products, the Petitioner failed to demonstrate that the contamination at the facility was predominantly the result of the discharge of petroleum products from petroleum storage systems. The entire site must therefore be declared ineligible for reimbursement under the Abandoned Tanks Restoration Program.

CONCLUSION

It is therefore ORDERED:

A. The Recommended Order of the Hearing Officer is adopted and incorporated by reference herein, except where specifically noted.

B. The ultimate recommendation of the Recommended Order is rejected for the reasons stated herein.

C. Eligibility for reimbursement for DEP Facility Number 64-9100172 is hereby DENIED.

Any party to this Order has the right to seek judicial review of the Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Order is filed with the clerk of the Department.

DONE AND ORDERED this 12th day of July, 1996, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

_____
VIRGINIA B. WETHERELL
Secretary
Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Filing And Acknowledgment
Filed, On This Date,
Pursuant To s 120.52
Florida Statutes, With The
Designated Department
Clerk, Receipt Of Which Is
Hereby Acknowledged.

_____ _____
Kathy C. Carter 7/12/96
Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent via United States Postal Service to:

Robert J. Riggio, Esquire
OWENS & RIGGIO, P.A.
125 N Ridgewood Ave.
Daytona Beach, Florida 32114

Ann Cole, Clerk and
P. Michael Ruff, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550 a

nd by hand delivery to: W. Douglas Beason, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, Florida 32399-3000

this 17th day of July 1996.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

_____

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Tallahassee, Florida 32399-3000
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