IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

SEMINOLE ELECTRIC COOPERATIVE, INC., Appellant,	
v.	Case No. 5D07-3005
	DOAH Case No. 06-929EPP
STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	DEP/OGC No. 06-0780
Appellee.	

APPELLANT'S RESPONSE IN OPPOSITION TO APPELLEE DEPARTMENT OF ENVIRONMENTAL PROTECTION'S MOTION TO STRIKE PORTIONS OF SEMINOLE'S INITIAL BRIEF

Appellant, Seminole Electric Cooperative, Inc. (Seminole), hereby responds in opposition to Appellee Department of Environmental Protection's (DEP's) Motion to Strike Portions of Seminole's Initial Brief. As discussed below, when read in context the isolated sentence on page 45 of the Initial Brief is not "scandalous" and therefore should not be stricken. Moreover, no legal requirement or policy rationale would be served by depriving this Court from the ability to consider previously reported Power Plant Siting Act (PPSA) administrative decisions in assessing the merits of this appeal.

1. The questioned sentence on page 45 of Seminole's Initial Brief bears no comparison whatsoever to the derogatory rhetoric at issue in State ex rel. Carter v. Beggs, 51 So. 2d 423 (Fla. 1951) and Easton v. Weir, 228 So. 2d 396 (Fla. 2d DCA 1969). DEP's motion implicitly acknowledged that the sentence in Seminole's Initial Brief is circumspect by describing it as "carefully phrased." This "carefully phrased" sentence does not accuse the Secretary of DEP of ex parte communications, and therefore it is inaccurate to characterize it as a "scandalous accusation of wrongdoing." Taking a step back, in the previous 44 pages of its Initial Brief, Seminole undertook to demonstrate that DEP's Final Order contravenes case law concerning stipulations, the Administrative Procedure Act, and the Power Plant Siting Act, and along the way the Initial Brief articulated the public purpose underlying these precedents. The final paragraph on page 45 re-emphasized an over-arching rationale for judicial review correcting agency orders that do not comport with applicable legal requirements: to avoid the appearance of impropriety and maintain the public's faith in the rule of law and good government. In other words, the legal points raised in the previous pages were not mere legal technicalities; requiring agencies to adhere to established legal requirements serves the significant public purpose of maintaining faith in government.

2. There is no merit to DEP's suggestion that references in the Initial Brief to the In re: OUC, Curtis H. Stanton Energy Center, 29 F.A.L.R. 2551 (DEP Dec. 2006) and In re: Florida Power & Light Co. West County Energy Center, 29 F.A.L.R. 2596 (Siting Bd. 2006) administrative decisions should be stricken. Contrary to DEP's assertions, officially reported agency decisions need not be included in the record on appeal or acknowledged via judicial notice in order to be considered in administrative appeals. DEP has cited no cases holding that such a requirement exists, and the undersigned is aware of no such authority.

(a) It is axiomatic that Florida administrative agencies must catalogue final orders in order to create "an ever-expanding library of precedents to which the agency must adhere or explain its deviation." McDonald v. Department of Banking and Finance, 346 So. 2d 569, 582 (Fla. 1st DCA 1977). See also, § 120.53(3), Fla. Stat. (2007). Such agency orders "indirectly determine controversies and affect persons yet unborn" by serving as stare decisis in future cases. Department of Health & Rehab. Servs, v. Barr, 359 So. 2d 503, 505 (Fla. 1st DCA 1978).

(b) Florida Administrative Law Reports (F.A.L.R.) is a widely recognized legal reporting service published bi-weekly in Florida. Page ii of every issue of F.A.L.R. states as follows: "Published since 1979, the FALR has been designated § 120.53(4), Florida Statutes "Official Reporter" by nearly every

agency of the State of Florida...." (Attachment 1.) DEP is listed on page ii as one of the agencies that relies on F.A.L.R. for compiling its orders and making them available to the public. Id.

(c) Florida Rule of Appellate Procedure 9.800 sets forth a "Uniform Citation System" applicable to "all legal documents" cited in briefs, *including judicial decisions and administrative decisions* of "Florida Administrative Agencies." Fla. R. App. P. 9.800(d). Specifically included in the appellate rules is the approved manner for citing to Florida Administrative Law Reports ("F.A.L.R."). Fla. R. App. P. 9.800(d)(3). This signifies that parties in an appellate case may cite to officially reported administrative agency decisions in the same manner as they cite to other legal authorities such as judicial decisions, statutes, and rules.

(d) In Beverly Healthcare Kissimmee v. Agency for Health Care Admin., 870 So. 2d 208, 211 (Fla. 5th DCA 2004), this court cited several administrative decisions, as reported in F.A.L.R., in explaining the rationale for its decision in an administrative appeal. The Initial Brief filed by the Appellant in that case included citations to several administrative decisions, relying on F.A.L.R. citations instead of the record on appeal; these administrative cases were included under the "Table of Authorities" in the Initial Brief as "Administrative Cases."

(Attachment 2.) These administrative cases were not judicially noticed in that appeal.

(e) DEP also has been known to cite to administrative decisions as legal authorities in its appellate briefs. For example, in its Answer Brief in Florida Power Corp. v. Department of Envtl. Regulation, 638 So. 2d 545 (Fla. 1st DCA 1994), DEP cited to several of its own previous administrative decisions, with citations to F.A.L.R., not the record on appeal. (Attachment 3.) In the Table of Citations of its brief, DEP cited its own previous administrative decisions as "Cases," along with judicial decisions. Id.

3. There also is no basis for DEP's argument that references in the Initial Brief to the In re: OUC, Curtis H. Stanton Energy Center and In re: Florida Power & Light Co. West County Energy Center administrative decisions should be stricken on grounds that Seminole's legal arguments based on those cases were not presented to the Secretary below.

(a) There was no adjudicatory hearing in this case, and Seminole's argument in the Initial Brief is that DEP was required to issue a Final Order certifying Unit 3 under the Power Plant Siting Act based on a statutorily-authorized stipulation process. It was not possible, and therefore was not necessary, for Seminole to cite during the proceedings below every legal authority that would be relied on in this appeal. Because DEP had signed stipulations

affirmatively resolving all issues of fact and law, Seminole had no way of anticipating what grounds DEP would attempt to rely on for denying certification until the Final Order denying certification was issued. Again, DEP signed stipulations agreeing to certification of Seminole's Unit 3 project. When DEP later signaled that it might rely on concerns regarding greenhouse gas emissions as a possible basis for reneging on the stipulations, Seminole vigorously contested that.

(b) In the Final Order, DEP abandoned the greenhouse gas argument and for the first time explicated a "failure of proof" rationale for denial. And in doing this, DEP for the first time cited to some of its own previous administrative decisions (with citations to F.A.L.R.). The Initial Brief represents Seminole's first opportunity to respond to DEP's rationale for denial, as articulated in DEP's Final Order. In arguing its case in the Initial Brief, Seminole cited what it believes are much more pertinent, persuasive, and on point administrative decisions that justify reversal of DEP's Final Order; i.e., the In re: OUC, Curtis H. Stanton Energy Center and In re: Florida Power & Light Co. West County Energy Center cases. It would be unwarranted and unfair for DEP to cite administrative decisions as a basis for denial in its Final Order, while Seminole is prevented from basing its argument on officially reported administrative decisions construing and applying the PPSA.

(c) No legal or policy rationale is served by DEP's effort to shield this court from the In re: OUC, Curtis H. Stanton Energy Center and In re: Florida Power & Light Co. West County Energy Center administrative cases in deciding this appeal on the merits. DEP has not, and cannot, state how it would be prejudiced by consideration of these two administrative cases. After all, DEP is well aware of both cases: DEP issued the Final Order in In re: OUC, Curtis H. Stanton Energy Center and it co-authored the Recommended Order incorporated in whole by the Siting Board in In re: Florida Power & Light Co. West County Energy Center.

4. Regarding DEP's suggestion that Seminole attempted to "circumvent" this Court's earlier ruling on its Motion for Judicial Notice, it is noteworthy that Seminole addressed this issue head-on on page 28, footnote 5, of its Initial Brief. As summarized in that footnote, and explained in more detail above, subsequent additional research into the matter revealed that judicial notice is not necessary in order to cite to officially reported agency decisions. In the absence of a rationale accompanying this Court's Order denying judicial notice, the undersigned determined it would be appropriate to cite to the administrative cases cited in F.A.L.R. with a brief explanation. Seminole's original Motion for Judicial Notice also requested judicial notice of certain DEP pleadings from the In re: OUC, Curtis

H. Stanton Energy Center case. Although Seminole regrets that judicial notice of these materials was not afforded, it has not cited to them in the Initial Brief.

5. It is revealing that DEP did not move to strike two references to the In re: OUC, Curtis H. Stanton Energy Center case in the Statement of Facts section of Seminole's Initial Brief. First, page 11 of the Initial Brief states that a joint motion filed below by both Seminole and DEP referenced the OUC case as precedent for implementing the stipulation process being invoked by the parties. Second, on page 16 it is noted that Seminole relied on the same OUC precedent in opposing DEP's Motion to Withdraw Stipulation. These are two references to the In re: OUC, Curtis H. Stanton Energy Center case that DEP cannot contest because they are accompanied by citations to the record on appeal. It is hard to understand, therefore, how DEP could contest the appropriateness of considering its own precedent (in the OUC case) on appeal.

6. In paragraph 6.b. of its Motion, DEP requests that several sections under Point II of the Initial Brief be stricken on grounds that these portions of the argument "are based entirely on counsel's unsupported interpretation of the final order [in the OUC case]...." The undersigned stands by the interpretation of the In re: OUC, Curtis H. Stanton Energy Center case as set forth in the Initial Brief, and respectfully suggests that DEP should be required to justify any alternative interpretation of the OUC decision that it wishes to propose in its Answer Brief.

Similarly, paragraph 5.d. in DEP's motion simply indicates that DEP's lawyer disagrees with Seminole's argument, and may wish to argue for an alternative interpretation of the OUC decision. Again, this is work to be undertaken in an Answer Brief, not a Motion to Strike. DEP's attention in its Motion to Strike to the nuances of the In re: OUC, Curtis H. Stanton Energy Center case underscores the significance of that case, and supports Seminole's contention that this Court should consider In re: OUC, Curtis H. Stanton Energy Center in order to achieve a just decision in this case.

7. Regarding the In re: Florida Power & Light Co. West County Energy Center case, DEP's additional arguments for striking portions of the Initial Brief have no merit. Seminole explained in the Initial Brief the precedential value of this Siting Board administrative decision in this appeal. Any arguments that DEP may wish to make distinguishing the FPL case - - arguing for limited applicability under Florida's APA or limited stare decisis effect - - should be set forth in DEP's Answer Brief. The FPL case explicates the Siting Board's interpretation concerning how to apply the burden of proof in Power Plant Siting Act cases. To preemptively eliminate any consideration of the FPL case - - as compared to evaluating competing arguments as to the case's precedential value - - in a decision on the merits in this appeal would serve no purpose. DEP's argument also appears to ignore that the Recommended Order in the FPL case was adopted in whole by

the Siting Board, and that the test for approving an application for Power Plant Siting Act certification applied by the Siting Board in the FPL case was the same test that DEP applied (subject to the statutory stipulation process) in the Final Order in this case.

(8) Several of the additional passages that DEP wants stricken are in the Argument section of Seminole's Initial Brief. DEP's arguments in opposition should be made in its Answer Brief; disagreement with the merits of Seminole's arguments is not the proper basis for a motion to strike.

(9) In conclusion, the questioned sentence on page 45 of the Initial Brief is not a "scandalous accusation" and should not be stricken. Moreover, there is no legal requirement or policy rationale to be served by depriving this Court of the opportunity to consider the In re: OUC, Curtis H. Stanton Energy Center and In re: Florida Power & Light Co. West County Energy Center cases in assessing the merits of this appeal. Seminole cited these administrative decisions in the manner prescribed under the Florida Rules of Appellate Procedure, and in the same manner as DEP and other advocates in other administrative appeals. It would be contrary to law, and not serve the purposes of justice in any manner, to deprive Seminole of the opportunity to cite to these officially reported administrative decisions in arguing the merits of this case.

Wherefore, Appellant Seminole Electric Cooperative, Inc. respectfully requests that DEP's Motion to Strike be denied.

Respectfully Submitted this 21st day of December, 2007,

James S. Alves, Fla. Bar No. 0443750
Gary V. Perko, Fla. Bar No. 0855898
David W. Childs, Fla. Bar No. 0013354
Hopping Green & Sams, P.A.
Post Office Box 6526
Tallahassee, FL 32314

Attorneys for:
Seminole Electric Cooperative, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing APPELLANT'S RESPONSE IN OPPOSITION TO APPELLEE DEPARTMENT OF ENVIRONMENTAL PROTECTION'S MOTION TO STRIKE PORTIONS OF SEMINOLE'S INITIAL BRIEF have been furnished to the following by U.S. Mail on this 21st day of December, 2007 to:

Jack Chisolm, Esq.
Deputy General Counsel
Dept. of Environmental Protection
3900 Commonwealth Blvd., MS 35
Tallahassee, FL 32399-3000

James V. Antista, Esq.
Fish and Wildlife Conservation Commission
620 South Meridian Street
Tallahassee, FL 32399-1600

Kelly A. Martinson, Esq.
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, FL 32399-2100

Sheauching Yu, Esq.
Department of Transportation
605 Suwannee Street, MS 58
Tallahassee, FL 32399-0450

Martha Carter Brown, Esq.
Florida Public Service Commission
Gerald Gunter Building
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Gordon B. Johnston, Esq.
County Attorney
601 Southeast 25th Avenue
Ocala, FL 34471

Mark Scruby, Esq.
Clay County Attorney
Post Office Box 1366
Green Cove Springs, FL 32043

Vance W. Kidder, Esq.
St. Johns River Water Management District
4049 Reid Street
Palatka, FL 32177

Brian Teeple
Northeast Florida Regional Planning Council
6850 Belfort Oaks Place
Jacksonville, FL 32216

Mike Halpin
Office of Siting Coordination
Department of Environmental Protection
2600 Blair Stone Road
Tallahassee, FL 32399

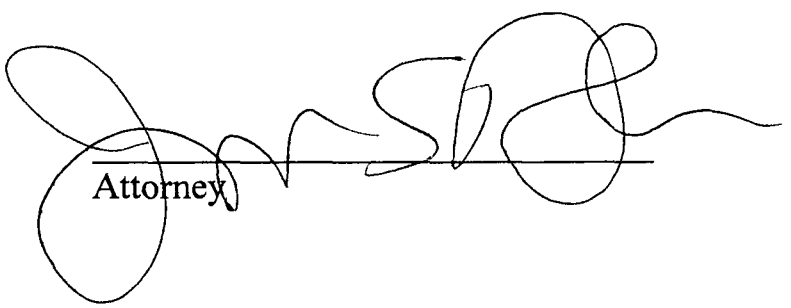
Russell D. Castleberry, Esq.
Post Office Box 758
Palatka, FL 32178

Patrick Gilligan
Attorney for City of Ocala
1531 SE 36 Avenue
Ocala, FL 34471

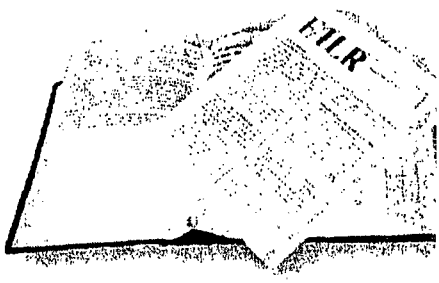
Wayne Smith
Union County Board of County Comm.
15 Northeast First Street
Lake Butler, FL 32054

Ronald Williams
Columbia County Board of County Comm.
Post Office Drawer 1529
Lake City, FL 32058

Timothy Keyser, Esq.
Sierra Club
Post Office Box 92
Interlachen, FL 32148-0092



FALR
Florida Administrative Law Reports



CURRENT DECISIONS VOLUME XXIX, No. 17
Cases from the Florida Supreme Court and the District Courts of Appeal involving administrative law and procedure

CHILDREN & FAMILIES - NONFINAL ORDER - CHILD CARE FACILITY - EMERGENCY SUSPENSION OF LICENSE QUASHED ON BASIS OF ABSENCE OF IMMEDIATE SERIOUS DANGER. "This Court is not persuaded by conclusory predictions of future harm based on factual allegations which do not demonstrate an immediate danger". St. Michael's Academy, Inc. v. The State of Florida, Department of Children and Families. 3rd D.C.A. 29 **F.A.L.R.** 3201.

ELDER AFFAIRS - AREA AGENCY ON AGING (AAA) - CONTRACT - BID - PROTEST - DOAH DISMISSAL OF APPEAL ON BASIS OF A LACK OF JURISDICTION REVERSED - AAA CONSTITUTES AN "AGENCY". The Court held "because the legislature designated the area agencies on aging as 'boards', we conclude that the DOAH has authority to hear this bid protest". Mae Volen Senior Center, Inc. v. Area Agency On Aging Palm Beach County/Treasure Coast, Inc., State of Florida, Department of Elder Affairs and Ruth Rales Jewish Family Service of South Palm Beach County. 4th D.C.A. 29 **F.A.L.R.** 3204.

MEDICINE - DISCIPLINE FOR *FAILURE TO REPORT OUT-OF-STATE DISCIPLINE REVERSED.* The Court found the physician was unaware of the out-of-state discipline. "The law does not impose penalties upon an individual for failing to take certain actions which is physically impossible for that individual to take". Corliss A. Rupp, M.D. v. Department of Health. 3rd D.C.A. 29 **F.A.L.R.** 3206.

REAL ESTATE (FREC) - BROKER - TECHNICAL ACCOUNTING VIOLATION - INCREASE IN PENALTY DURING APPELLATE RELINQUISHMENT TO CORRECT FINAL ORDER REVERSED. The Court held "Under these circumstances, we find a substantial violation of due process in FREC's unilateral imposition of the maximum penalty possible during a relinquishment intended merely to correct its fact-finding errors in the original final hearing". Shirley K. Bemenderfer v. DBPR, Div. of Real Estate. 4th D.C.A. 29 **F.A.L.R.** 3211.

ATTACHMENT 1

FLORIDA ADMINISTRATIVE LAW REPORTS (FALR) ISSN 0194-4800 USPS 0464-150 is a publication of Florida Administrative Law Reports (FALR), Incorporated, Post Office Box 385, Gainesville, Florida, 32602, Phone (352) 375-8036.

Date of Publication: September 13, 2007

Florida Administrative Law Reports (FALR) is published biweekly, except for the first two weeks of January and July, with quarterly cumulative indexes published in January, April, July and October by Florida Administrative Law Reports (FALR), 618 NE 2nd Street, Gainesville, Florida, 32601. Phone (352) 375-8036. Subscription Price is $699.00 per year. Periodicals postage paid at Gainesville, Florida. POSTMASTER: Send address corrections to FLORIDA ADMINISTRATIVE LAW REPORTS, Post Office Box 385, Gainesville, Florida 32602. Your comments and suggestions are valued (352) 375-8036 or **E-mail: FALR @ FALR.COM.** You can access our Home Page at **WWW.FALR.COM.**

FLORIDA ADMINISTRATIVE LAW REPORTS
(FALR)

Published since 1979, the FALR has been designated §120.53(4), Florida Statutes "Official Reporter" by nearly every Agency of the State of Florida:

Agencies and Boards Published and Indexed in the FALR

AGENCY FOR HEALTH CARE ADMINISTRATION
- Certificate of Need (CON)
- Medicare and Medicaid
- Clinical Labs
- Clinical Technicians
- Health Care Facilities

HEALTH & REHABILITATIVE SERVICES (HRS, Department of)
- Central Abuse Registry
- Human Services
- Pest Control
- Public Assistance
- Sanitation
- Septic Tanks

ADMINISTRATIVE HEARINGS (DOAH)
- All §120.54(4) and §120.56 Rule Challenges
- Attorney's Fees Cases
- Recommended Orders for "Official Reporter" Agencies

OTHER AGENCIES
- Banking & Finance
- Education Practices Commission
- Ethics Commission
- Highway Safety & Motor Vehicles
- Human Relations Commission
- Legal Affairs Department
- Revenue Department
- State Department
- Education Department

ENVIRONMENTAL PROTECTION (DEP, Department of)

Broad Regulation of All Impacts on Air and Waters of Florida
- Community Affairs
- Florida Land & Water Adjudicatory Commission
- South Florida Water Management
- Game & Fresh Water Fish Commission
- Northwest Fla. Water Management

PROFESSIONAL & BUSINESS REGULATION (DBPR)
- Dentistry
- Medicine
- Nursing
- Optometry
- Osteopathic Medical Examiners
- Pharmacy
- Podiatry
- Veterinary Medicine
- Accountancy
- Acupuncture
- Architecture
- Auctioneers
- Chiropractic
- Electrical Contractors
- Engineers
- Funeral Directors
- Hearing Aid Specialists
- Land Surveyors
- Landscape Architects
- Massage
- Naturopathic Examiners
- Nursing Home Administrators
- Opticianry
- Pilot Commissioners
- Psychological Examiners
- Talent Agents

All available & precedential current Final Orders, Declaratory Statements and Judicial Decisions following precedential §120.57(1) Formal Proceedings are published every two weeks -- Full Text.

*Note: Space limitations require selected editing of certain sections and types of orders. Call our office at (352) 375-8036 for details.

IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT
STATE OF FLORIDA

BEVERLY HEALTHCARE KISSIMMEE,

Appellant,

v.

CASE NO.: 5D02-1874
LT CASE NO.: 01-3142

AGENCY FOR HEALTH CARE ADMINISTRATION,

Appellee.
_____/

INITIAL BRIEF

DONNA HOLSHOUSER STINSON
Florida Bar No. 0181261
MAURA M. BOLIVAR
Florida Bar No. 295840
BROAD and CASSEL
215 S. Monroe St., Ste. 400
P.O. Drawer 11300
Tallahassee, FL 32302
(850)681-6810

ATTACHMENT 2

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

Where an agency changes its existing policy or practice, rulemaking procedures are generally required. Cleveland Clinic Florida Hosp. v. AHCA, 679 So.2d 1237, 1241-42 (Fla. 1st DCA 1996) (AHCA's change in policy to impose comparative review on hospitals seeking to construct replacement facilities is a rule); Aventura Hosp. and Med. Center, et al. v. AHCA, 19 FALR 3437 (Fla. DOAH 1997) (AHCA's change in practice embodied in its Manual is a rule).

The statute provides that the agency may adopt policy without formal rulemaking only if it can show that rulemaking is not feasible or practical. AHCA's record and final order here did not even try to state any foundation reason why rulemaking would not have been feasible or practical in this case.

Rulemaking best serves the public interest, by allowing other interested parties, such as the Health Care Association (amicus here), to participate and show countervailing reasons why the proposed new policy is unlawful or ill-advised. Rulemaking allows an opportunity for legislative oversight under §120.545, F.S., which is not available in adjudicative proceedings. Rulemaking also assures uniform enforcement, and prevents unfair singling out of one facility, such as Kissimmee in this case, when competing facilities are judged under the more lenient standard.

IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT
STATE OF FLORIDA

FLORIDA POWER CORPORATION, Appellant, vs. STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL REGULATION, Appellee.	)	DOCKET NO. 92-2933

On Appeal from a Final Order of the State of Florida,
Department of Environmental Regulation

APPELLEE'S ANSWER BRIEF

DOUGLAS H. MACLAUGHLIN
Assistant General Counsel
Department of Environmental
Regulation
2600 Blair Stone Road
Tallahassee. Florida 32399-2400
Telephone (904) 488-9730
Fla. Bar # 251054

ATTACHMENT 3

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

DER's position in this case is consistent with its policy that replacing an existing natural environmental habitat with another habitat is not environmentally acceptable. See Fla. Admin. Code Rule 17-312.340(1)(b) (Mitigation rule stating that off-setting a project's adverse impacts to a particular wetland will usually best be addressed through protection, enhancement, or creation of the same type of wetlands that are present at the time of the project's impact or that were historically present.) See also Sarasota County v. DER, 13 FALR 1727, 1729 n. 5 (DER Final Order April 4, 1991) (estuarine ecosystem cannot be replaced with marine ecosystem). See also testimony of Janet Llewellyn, Bureau Chief of DER's Bureau of Wetland Management, T. 819-825 (DER has considered clearing of forested wetlands and replacement with herbaceous wetlands to be an adverse secondary impact of dredge and fill projects involving gas lines, elevated trains, and other power lines, and has required these adverse impacts to be mitigated before permits were issued).

The Standard- Public Interest and Adverse Impacts

Under Section 403.918(2), Fla. Stat., a dredge and fill permit may not be issued unless, based on DER's weighing of certain impacts, the permit applicant provides reasonable

Note that there is nothing in the statute requiring similarity of the nature of the proposed project with the other projects being considered. The statute clearly is requiring DER to look at the cumulative impacts of the various projects. If the nature of the projects are not similar (e.g. a power line project and a road) they could still have a similar impact (removal of a portion of Reedy Creek Swamp forested wetland).

In The Conservancy, Inc. v. A. Vernon Allen Builder, Inc., and DER, 580 So.2d 772 (Fla. 1st DCA 1991), the court approved DER's interpretation of Section 403.919 as stated in the DER final order of Peebles v. DER, 12 FALR 1961 (April 11, 1990). The Court specifically approved the following statements in that order:

> In order to show entitlement to a dredge and fill permit, an applicant must show that he has provided reasonable assurance that water quality standards will not be violated and that the project is not contrary to the public interest, and both of those tests must take into consideration the cumulative impacts of similar projects which are existing, under construction or reasonably expected in the future ... The applicant's burden of proof includes the burden of giving reasonable assurance that cumulative impact do not cause a project to be contrary to the public interest or to violate water quality standards. (at 778)

and

> ... the purpose of cumulative impact analysis is to distribute equitably that amount of dredging and filling activity which may be done without

B. Burden of Proof

FPC objects to the burden of proof put upon them by DER concerning the cumulative impacts issue, specifically concerning the locality of projects potentially causing cumulative impacts.

In its Final Order and Order of Remand DER stated the burden of proof on FPC, the permit applicant, includes the burden of providing reasonable assurances that cumulative impacts will not cause a project to fail the public interest test under section 403.918(2). F.O. p. 21, R. 655, O.R. p. 14, R. 526. This position is well supported in case law. The Conservancy, Inc. v. A. Vernon Allen Building and DER, 580 So.2d 772 (Fla. 1st DCA 1991); Brown v. DER, 9 FALR 1871 (DER Final Order, March 27, 1987), per curium aff'd, 531 So.2d 173 (Fla. 4th DCA 1988); Department of Transportation v. J.W.C., Inc., 396 So.2d 778 (Fla. 1st DCA 1981).

DER's Final Order simply clarifies that if it is at issue as to where the appropriate geographical area should be for cumulative impact considerations, an applicant does not shift the ultimate burden of proof to the Department by just submitting some evidence on the matter in its initial case. F.O. p. 22, R. 656. FPC objects to this interpretation.

Section 403.919, Florida Statutes, requires a review of cumulative impacts. It does not describe any geographical limitation for cumulative impact consideration, other than