STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

CLARENCE ROWE, Petitioner, vs. OLEANDER POWER PROJECT, L.P., and DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondents.	)	OGC CASE NO. 99-0932 DOAH CASE NO. 99-2581

FINAL ORDER

On September 27, 1999, an Administrative Law Judge with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order to the Department of Environmental Protection ("Department") in this formal administrative proceeding. A copy of the Recommended Order is attached hereto as Exhibit A. The Recommended Order indicates that copies were served upon *pro se* Petitioner, Clarence Rowe ("Petitioner"), and upon counsel for Co-Respondent, Oleander Power Project, L.P. ("Oleander") and the Department of Environmental Protection . Exceptions to the Recommended Order were filed on behalf of Oleander on October 11, 1999. The matter is now before the Secretary of the Department for final agency action.

BACKGROUND

Oleander proposes to build and operate an electrical power plant on approximately 38 acres of land located northeast of the intersection of Interstate 95 and State Road 520 in an unincorporated area of Brevard County, Florida (the "Project").

The Project includes the construction and operation of five 190 megawatt combustion turbines to be used for the generation of electricity. The Project also includes the construction and use of two fuel oil storage tanks, two water storage tanks, an administrative building, a stormwater management system, and other ancillary facilities. The Project is a "peaking" electrical power plant designed to operate only during times of peak demand.

On November 24, 1998, Oleander filed an application with the Department seeking an air construction permit for the Project. On March 26, 1999, the Department issued a "Public Notice of Intent to Issue an Air Construction Permit" for the Project. By letter dated April 12, 1999, Petitioner requested an administrative hearing to challenge the issuance of the air construction permit. The Department then referred the matter to DOAH and Administrative Law Judge Daniel Manry ("ALJ") was assigned to the case. A formal administrative hearing was conducted by the ALJ on August 30, 1999. Testimony and documentary evidence was presented at the formal hearing by Petitioner and Oleander.

The ALJ subsequently entered a Recommended Order ("RO") in this case on September 27, 1999. The RO contains unchallenged findings by the ALJ that air emissions from the Project "will not cause any significant impact on the water quality of water bodies in Brevard County" and "will not cause or significantly contribute to a violation of any ambient air quality standard or PSD increment." (FOF 41, 43) The ALJ also concluded in the RO that "the Project will be compatible with, and will not adversely affect, any residential neighborhood". (COL 59) The ALJ ultimately recommended that

a final order be entered by the Department issuing an air construction permit for the Project, subject to the conditions and limitations contained in the Draft Permit.

RULINGS ON OLEANDER'S EXCEPTIONS

Notwithstanding the ALJ's favorable findings, conclusions, and recommendation that an air construction permit be issued, Oleander has filed various Exceptions seeking to "clarify and correct minor discrepancies" in the RO.

Exceptions 1 and 2

These two Exceptions seek to correct purported errors in the Preliminary Statement portion of the RO wherein the ALJ summarizes the procedural background in this case. In its first Exception, Oleander requests that the ALJ's descriptions of the exhibits on page three of the RO be modified to accurately reflect those exhibits actually admitted into evidence at the formal hearing. Oleander correctly notes that not all of the exhibits "submitted" by it and by Petitioner at the formal hearing were admitted into evidence by the ALJ. (Tr. Vol. I, 131-132, 175-180; Vol. II, 217-218, 237, 252, 261)[1]

Oleander's second Exception relates to a portion of the ALJ's Preliminary Statement on page four of the RO asserting that Petitioner's allegations concerning environmental justice issues "had been previously stricken from the Petition in response to Oleander's motion". Oleander correctly points out that the ALJ did not grant either of its requests that Petitioner's "environmental justice" allegations be stricken as set forth in Oleander's motions filed on June 23 and July 30, 1999. Rather, the record reflects that the ALJ granted Oleander's alternative motion to dismiss the original Petition by order entered on July 9, 1999. The record also reflects that Oleander's subsequent

[1] The symbol "Tr." followed by a volume and page number will be used to refer to the transcript of testimony presented at the DOAH formal hearing held on August 30, 1999.

motion to strike the portion of the Amended Petition dealing with environmental justice issues was withdrawn by Oleander at the DOAH formal hearing and thus was not granted by the ALJ. (Tr. Vol. I, 67-72)

Accordingly, page three of the Preliminary Statement portion of the RO is modified to reflect that Petitioner's Exhibits 1, 3, and 7 and Oleander's Exhibits 1-17, 19-32, and 34-46 were admitted into evidence at the formal hearing. In addition, the second sentence of page four of the Preliminary Statement erroneously stating that Petitioner's environmental justice allegations "had been stricken from the petition in response to Oleander's motion" is deleted.

In view of the above rulings, Oleander's Exceptions 1 and 2 are granted.

Exception 3

Oleander's third Exception challenges a portion of the ALJ's "Findings of Facts". Oleander takes exception to the second sentence of Finding of Fact 6 wherein the ALJ finds that the Project "will operate only during times of peak demand caused by hot or cold weather or storm events". (emphasis supplied) This Exception appears to be well-taken. Findings of fact in a DOAH recommended order may be rejected or modified if the reviewing agency reviews the entire record and makes a determination in the final order that the findings are not based on competent substantial evidence. See, subsection 120.57(1)(l), Florida Statutes.

A review of the entire record indicates that there is no competent substantial evidence of record in this case supporting the ALJ's challenged findings that the Project will operate "only" during times of peak demand caused by hot or cold weather or storm events. Oleander correctly notes that there is evidence of record that the Project's

power plant will also operate during various types of emergency situations that are not weather related. (Tr. Vol. I, 96-97) Therefore, Exception 3 is granted and the second sentence of the ALJ's Finding of Fact 6 is modified by deleting therefrom the word "only".

Exception 4

Oleander's fourth Exception contends that some of the factual findings set forth in the ALJ's Finding of Fact 11 are not supported by competent substantial evidence of record. This contention appears to have merit. A review of the entire record reveals the absence of any competent substantial evidence supporting the ALJ's findings in the second sentence of Finding of Fact 11 that all "[f]uel oil contains a maximum of 0.05 percent sulfur" and is "35 to 50 percent more expensive than natural gas".

There is evidence of record that the fuel oil to be used "at the Oleander Project" will contain a maximum of 0.05 percent sulfur. (Tr. Vol. I, 165; Oleander's Exhibits 9, 11) There is also evidence of record that the "cost of burning fuel oil" in the Project's power plant will be 35 to 50 percent higher than the cost of burning natural gas. (Tr. Vol. I, 173; Oleander's Exhibit 6) However, this record evidence does not support the ALJ's challenged findings which, taken at face value, would seem to indicate that all fuel oil contains a "maximum of 0.05 percent sulfur" or that all fuel oil is "35 to 50 percent more expensive than natural gas".

In view of the above, Oleander's Exception 4 is granted and the second sentence of the ALJ's Finding of Fact 11 is modified to read as follows:

> The fuel oil to be used at the Oleander Project will contain a maximum of 0.05 percent sulfur, is 35 to 50 percent more expensive to use than natural gas, and thus imposes economic incentives for Oleander to minimize the use of fuel oil.

Exception 5

This Exception takes exception to the first sentence of Finding of Fact 36 of the RO wherein the ALJ finds that the "cumulative impacts from the Project and other sources of air pollution in the area will be insignificant". (emphasis supplied) Oleander contends that this finding of the ALJ does not accurately reflect the evidence in this case. There is expert testimony of record establishing that the Project will not have a measurable impact on ambient air quality. (Tr. Vol. II, 206) There is also expert testimony and related documentary evidence establishing that the cumulative impacts of the Project and other major sources of air pollution in the area will "generally be 50 percent or lower than the Florida ambient air quality standards".[2] (Tr. Vol. II, 205-206; Oleander's Exhibit 1, Table 3-1)

I concur with the observation in Oleander's Exception 5 that the evidence referred to in the preceding paragraph does not support the ALJ's challenged finding that the cumulative impacts from the Project and other sources of air pollution in the area will be "insignificant". Furthermore, a review of the entire record does not reveal any other competent substantial evidence supporting this factual finding of the ALJ. Accordingly, the first sentence of the ALJ's Finding of Fact 36 is modified to read as follows:

> When the cumulative impacts from the Project and other sources of air pollution in the area are considered together, the maximum impact from their combined emissions will be 50 percent or less of the applicable AAQS (Ambient Air Quality Standards).

[2] "Ambient air quality standards" are defined by Department rule as "restrictions established to limit the quantity or concentration of an air pollutant that may be allowed to exist in the ambient air for any specific period of time". Rule 62-204.200(5), F.A.C. The Florida ambient air quality standards are set forth in Rule 62-204.240, F.A.C.

Exception 6

Oleander's Exception 6 takes exception to the second sentence of paragraph 56 of the RO consisting of the ALJ's legal conclusion that "[c]ourts have consistently held that neither DEP nor DOAH has jurisdiction to consider the provisions of Executive Order 12898". Oleander contends that this legal conclusion of the ALJ is incorrect and should be deleted. I conclude, however, that the challenged legal conclusion of the ALJ appears to be a reasonable interpretation of the governing case law and should not be rejected.

The case law cited by the ALJ holds that the issuance and denial of permits by the Department must be based solely on compliance with the environmental pollution control standards and rules of the State of Florida over which the Department has regulatory jurisdiction. Taylor v. Cedar Key Special Water and Sewage District, 590 So.2d 481, 482 (Fla. 1st DCA 1991); Council of the Lower Keys v. Charley Toppino & Sons, Inc., 429 So.2d 67, 68 (Fla. 3d DCA 1983). As noted by the ALJ in paragraph 55 of the RO, President Clinton's Executive Order 12898 directs federal agencies to identify and address those situations where federal programs, policies, and activities have disproportionate adverse impacts on minority or low-income populations in the United States. (emphasis supplied) Executive Order 12898 is thus expressly limited in its application to federal agencies. Therefore, the Department obviously has no regulatory jurisdiction over the federal law matters addressed in this Executive Order.

In addition, both federal and Florida case law holds that claims based on alleged violations of federal laws are beyond the jurisdiction of a state administrative proceeding. See Curtis v. Taylor, 648 F.2d 946, 948 (5th Cir. 1980) (a DOAH hearing

officer is not empowered to consider claims in an administrative hearing pursuant to § 120.57, Florida Statutes, that certain state actions are invalid based on alleged violations of federal law). Accord Miccosukee Tribe v. South Florida Water Management District, ER F.A.L.R. 98:119 (Fla. DEP 1998), *affirmed per curiam*, 721 So.2d 389 (Fla. 3d DCA 1998); Legal Environmental Assistance Foundation v. Dept. of Environmental Regulation, 11 F.A.L.R. 5227 (Fla. DER 1989). See also Metro. Dade County v. Coscan Florida, Inc., 609 So.2d 644, 650 (Fla. 3d DCA 1992) (concluding that a DOAH hearing officer erred by relying on the federal statutory standard for protection of endangered species, rather than the standard set forth in the Florida Statutes).

In view of the above, Oleander's Exception 6 is denied.

Exception 7

Oleander's final Exception takes exception to the ALJ's legal conclusion in paragraph 58 of the RO that consideration of evidence at the final hearing relating to environmental justice issues "would have been contrary to the law of the case established in previous rulings in this proceeding". Oleander contends that this legal conclusion of the ALJ is erroneous for the reasons set forth in its second Exception. I agree with this contention.

In the above ruling granting Oleander's Exception 2, I concluded that the ALJ did not enter orders in this case striking Petitioner's environmental justice allegations set forth in the original Petition and in the Amended Petition. Consequently, Oleander correctly notes that there was no "law of the case" established in this proceeding prior to the DOAH final hearing pertaining to Petitioner's environmental justice allegations.

For the reasons stated above, Oleander's Exception 7 is granted and the second sentence of the ALJ's Conclusion of Law 58 is deleted.[3] However, the preceding ruling in this Final Order adopts the ALJ's related legal conclusion that Petitioner's environmental justice allegations raise federal law issues which are beyond the jurisdiction of this state administrative proceeding. Accordingly, the rejected legal conclusion of the ALJ is deemed to be "harmless" error.

Having ruled on all of the Exceptions to the Recommended Order filed in this proceeding, it is therefore ORDERED:

A. The Preliminary Statement and numbered paragraphs 6, 11, 36, and 58 of the Recommend Order are modified as set forth above. These modifications are all deemed to deal with "minor" discrepancies in the Recommended Order not affecting the ultimate disposition of this proceeding.

B. As modified, the Recommended Order is adopted and incorporated herein by reference.

C. The Department's Division of Air Resources Management is hereby directed to ISSUE to Oleander the requested air construction permit for the Project, subject to the terms and conditions set forth in the Draft Permit (DEP File No. 0090180-001-AC; PSD-FL-258), dated March 26, 1999, which are incorporated by reference herein.

Any party to this proceeding has the right to seek judicial review of the Final 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,

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[3] I find that the substituted conclusion of law set forth in this portion of the Final Order is as reasonable or more reasonable than the ALJ's conclusion of law which was rejected.

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 Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 10th day of November, 1999, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

for DAVID B. STRUHS
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILING AND ACKNOWLEDGMENT FILED, ON THIS DATE, PURSUANT TO §120.52 FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

CLERK 11/10/99 DATE

CERTIFICATE OF SERVICE

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

Clarence Rowe
418 Pennsylvania Avenue
Rockledge, FL 32955

David S. Dee, Esquire
Landers & Parsons
310 West College Avenue
Tallahassee, FL 32301

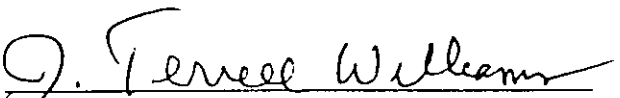
Ann Cole, Clerk and
Daniel Manry, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

W. Douglas Beason, Esquire
Scott A. Goorland, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 12th day of November, 1999.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CLARENCE ROWE,

Petitioner,

vs.

OLEANDER POWER PROJECT, L.P., and DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

Case No. 99-2581

RECOMMENDED ORDER

An administrative hearing was conducted on August 30, 1999, in Viera, Florida, by Daniel Manry, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Clarence Rowe, pro se
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For Respondent, Oleander Power Project, L.P.: David S. Dee, Esquire
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For Respondent, Department of Environmental Protection: Scott A. Goorland, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether the Department of Environmental Protection ("DEP") should issue an air construction permit authorizing Oleander Power Project, L.P. ("Oleander"), to

EXHIBIT "A"

build and operate an electrical power plant in Brevard County, Florida, that includes five combustion turbines and two fuel oil storage tanks (the "Project").

PRELIMINARY STATEMENT

On November 24, 1998, Oleander filed an application with DEP for a permit authorizing the construction of certain stationary sources of airborne emissions (an "air construction permit"). On March 26, 1999, DEP issued a "Public Notice of Intent to Issue an Air Construction Permit" ("Public Notice"). The Public Notice included attachments comprised of DEP's draft "Air Construction Permit" (Permit No. PSD-FL-258; DEP File No. 0090180-001-AC)(the "Draft Permit"), "Technical Evaluation and Preliminary Determination," and "Best Available Control Technology Determination."

By letter dated April 12, 1999, Petitioner requested an administrative hearing. On June 9, 1999, DEP referred the matter to the Division of Administrative Hearings ("DOAH") to conduct an administrative hearing.

On June 23, 1999, Oleander filed a motion to dismiss for failure to comply with requirements prescribed in the Public Notice for a petition for administrative hearing. After hearing argument from both parties by telephone conference, the motion to dismiss was granted with leave to file an amended petition no later than July 19, 1999.

On July 19, 1999, Petitioner timely filed a Petition for Administrative Hearing (the "Petition"). On July 27, 1999, an

administrative hearing was scheduled for August 25, 1999, and subsequently rescheduled for August 30, 1999.

At the administrative hearing, Oleander presented the testimony of four witnesses, each of whom was accepted as an expert. Mr. Richard Zwolak was accepted as an expert in land-use planning, land-use compatibility analyses, and socioeconomic and environmental impact assessments. Mr. Ken Kosky was accepted as an expert regarding air pollution control and best available control technology. Mr. Bob McCann was accepted as an expert in meteorology, air quality dispersion modeling, and air pollution impact assessments. Mr. Al Linero was accepted as an expert in air pollution control issues, DEP regulations that govern new sources of air pollution, and air permitting. Oleander submitted Exhibits 1-3, 5-17, 19-32, and 34-46 for admission in evidence.

DEP did not call any witnesses or submit any exhibits for admission in evidence. Petitioner presented the testimony of one witness who was not tendered as an expert. Petitioner submitted Exhibits 1-12 for admission in evidence.

Petitioner's request for public comment was granted. Five individuals entered un-sworn public comment on the record. The individuals were not placed under oath or cross-examined because the agency stated that it did not propose to "consider such material" within the meaning of Section 120.57(1)(b), Florida Statutes (1997). (All chapter and section references are to Florida Statutes (1997) unless otherwise stated.)

The Petition included allegations of "environmental injustice" and harm to Petitioner's extended family and their progeny. Those allegations had been previously stricken from the Petition in response to Oleander's motion. At the administrative hearing, Oleander attempted to introduce evidence concerning "environmental justice" issues. DEP objected to the introduction of such evidence on the ground that DEP does not have jurisdiction to consider issues of environmental justice. DEP's objection was sustained, but Oleander was allowed to proffer its evidence concerning environmental justice.

The identity of the witnesses and exhibits, and any attendant rulings, are set forth in the Transcript of the hearing filed on September 7, 1999. Petitioner did not file a proposed recommended order ("PRO"). Respondent timely filed its PRO on September 17, 1999.

FINDINGS OF FACT

1. Oleander seeks an air construction permit to build and operate an electrical power plant in Brevard County, Florida. Oleander provided reasonable assurances that the Project will comply with all of the conditions and emissions limitations prescribed by DEP in the Draft Permit.

2. The Project received adequate review from the state agency responsible for regulating the Project. DEP reviewed Oleander's application, requested and received additional information concerning the Project, and independently verified the impacts assessments contained in the application.

3. The Project received adequate review from Brevard County. Oleander executed a Stipulated Settlement Agreement with Brevard County (the "Brevard County Agreement") in which Oleander agreed to comply with restrictions concerning the Project's hours of operation, minimum buffers, noise, odor, vibrations, traffic, and other issues. The Brevard County Agreement provides additional assurances that the Project will not adversely impact the public.

4. Members of the public received adequate notice of the Project and had sufficient opportunity to make public comments. On March 3, 1999, DEP held a public meeting in Brevard County to receive public comments regarding Oleander's application. On March 26, 1999, DEP issued its Public Notice of DEP's intent to grant the Draft Permit to Oleander. On April 8, 1999, DEP's Public Notice was published in Florida Today. On May 13, 1999, DEP held a second public meeting in Brevard County to receive public comments concerning Oleander's application. Members of the public had an opportunity during the administrative hearing to enter their comments on the record.

5. The Project includes the construction and operation of five 190 megawatt ("MW") combustion turbines that will be used to generate electricity. The Project also includes the construction and use of two fuel oil storage tanks, two water storage tanks, an administrative building, a stormwater management system, and other associated and ancillary facilities.

6. The Project is a "peaking" power plant. It will operate only during times of peak demand caused by hot or cold weather or storm events.

7. The Draft Permit authorizes Oleander to operate the Project's combustion turbines for a maximum of 3,390 hours per year, or approximately 39 percent of the available hours in a year. During the remainder of the year, the combustion turbines will not operate and will not have any airborne emissions. Based on the historical experience of other peaking power plants in Florida, the combustion turbines are expected to operate less than 800 hours per year.

8. Oleander's combustion turbines will be the most advanced turbines used in Florida for peaking service. Oleander's turbines will be more efficient, in terms of emissions and producing power, than the turbines currently used at other peaking plants in Florida.

9. The Project will use General Electric ("GE") Frame 7FA combustion turbines. These turbines are capable of complying with the emission limits and requirements in the Draft Permit. Oleander will hire staff or train their own staff to operate the Project in compliance with the Draft Permit. Oleander's parent company already has a training program for its plant operators. Oleander has operated similar projects successfully.

10. The primary fuel for the power plant will be natural gas. Natural gas is the cleanest burning of all fossil fuels.

11. In the event that natural gas becomes unavailable, the Draft Permit authorizes use of low sulfur distillate fuel oil

("fuel oil") for the equivalent of 1,000 hours of full-load operations per year. Fuel oil contains a maximum of 0.05 percent sulfur, is 35 to 50 percent more expensive than natural gas, and imposes economic incentives for Oleander to minimize the use of fuel oil.

12. Water needed for the Project will be provided by the City of Cocoa. Oleander will not install any on-site wells to supply water to the Project. All of the wastewater from the Project will be sent by pipeline to the City of Cocoa's wastewater treatment plant. The Project will not discharge any industrial wastewater on-site.

13. The Project will be built on a site that is located northeast of the intersection of Interstate 95 ("I-95") and State Road ("SR") 520 in unincorporated Brevard County (the "Site"). The Site contains approximately 38 acres of land.

14. The Site is appropriate for use as an electrical power plant. The Site already is zoned for industrial purposes. The surrounding areas are primarily zoned for industrial uses. An existing electrical substation is located on the north side of the Site. An existing electrical transmission line corridor is located on the west side of the Site. Townsend Road is located on the south side of the Site. An existing natural gas pipeline is located nearby, on the west side of I-95, and can provide gas for the Project.

15. Residential, commercial, and industrial development within a three kilometer radius of the Site is minimal. The

Project will be compatible with those industrial and commercial land uses that are located in the area near the Site.

16. The closest residential areas are more than 1,400 feet from the Site. The Site is compatible with the closest residential neighborhoods. The Site and adjacent off-Site areas provide a significant buffer to the closest residential areas. The Site can be developed without causing adverse impacts on residential areas.

17. Combustion turbines currently operate at many locations in diverse population centers in Florida. For example, combustion turbines are operated within 800 feet of the Shands Hospital at the University of Florida, within 1,200 feet of Cinderella's Castle at Disney World's Magic Kingdom, and near the Lake Worth High School. Combustion turbines also are located near several residential neighborhoods in the state.

18. DEP and Oleander evaluated the Project in accordance with requirements prescribed in DEP's Prevention of Significant Deterioration ("PSD") program. As part of the PSD review, a determination was made of the Best Available Control Technology ("BACT").

19. A BACT determination involves a case-by-case analysis of those air pollution control technologies that are feasible and can achieve the maximum emission reductions. A BACT determination also requires an analysis of the costs, environmental impacts, and energy impacts associated with the use of each one of the proposed control technologies.

20. A BACT determination results in the establishment of an emission limit for each pollutant of concern. In this case, DEP determined the appropriate BACT limits for the Project's emissions of carbon monoxide ("CO"), oxides of nitrogen ("NOx"), sulfur dioxide ("SO_2"), sulfuric acid mist ("SAM"), volatile organic compounds ("VOCs"), particulate matter ("PM"), and particulate matter less than ten microns in diameter ("PM_{10}"). (PM and PM_{10} are referred to herein as "PM/PM_{10}.") BACT emission limits applicable to the Project are set forth in the Draft Permit, and are incorporated by reference in this Recommended Order.

21. DEP determined that when the Project operates on natural gas, BACT for NOx is an emission limit of 9 parts per million ("ppm"), corrected to 15 percent oxygen. This emission limit is based on the use of dry low NOx ("DLN") combustion technology utilized in the combustion turbines included in the Project. The proposed NOx emission limit of 9 ppm is the lowest emission limit in Florida for simple cycle peaking power plants and sets the standard for similar facilities throughout the United States.

22. DEP determined that when the Project operates on fuel oil, BACT for NOx is an emission limit of 42 ppm, corrected to 15 percent oxygen. This emission limit is based on the use of DLN and wet injection technology. Wet injection technology involves the injection of either water or steam directly into the combustor to lower the flame temperature and thereby reduce the formation of NOx.

23. The U.S. Fish and Wildlife Service ("USFWS") provided comments to DEP concerning the Project. In their comments, the USFWS suggested that the NOx emission limit should be 25 ppm when the Project is operating with fuel oil. However, the USFWS' suggestion was based on the USFWS' misreading of the provisions of other PSD permits. When read correctly, those permits establish the same NOx emission limit when firing fuel oil that DEP established in this case, i.e., 42 ppm.

24. In its BACT determination, DEP considered whether a selective catalytic reduction ("SCR") system should be used to reduce the Project's NOx emissions. SCR is an add-on NOx control system in which ammonia is injected into the exhaust gases of a combustion turbine. The exhaust gases are then exposed to a catalyst where the ammonia and the NOx react to form nitrogen and water.

25. SCR does not represent BACT in this case and should not be required for the Project. The use of SCR would impose excessive costs on the Project, adversely impact the Project's energy efficiency, and cause increased emissions of particulate matter and ammonia.

26. BACT for CO and VOCs is based on the Project's use of an advanced combustor design, i.e., DLN technology, and good combustion practices. The use of an oxidation catalyst for CO removal is not required because an oxidation catalyst is not cost effective for the Project. BACT for PM/PM_{10}, SO_2, and SAM is based on good combustion practices and the use of clean low sulfur fuels.

27. The PSD program establishes separate ambient air quality standards for Class I and Class II areas defined in Florida Administrative Code Rule 62-204.360(4). (Unless otherwise stated, all references to rules are to rules promulgated in the Florida Administrative Code in effect on the date of this Recommended Order.) The Project is located in a Class II area. The Project's impacts on ambient air concentrations will be below all applicable PSD standards ("increments") prescribed in Rule 62-204.260(2) for Class II areas.

28. The nearest PSD Class I area is the Chassahowitzka Wildlife Refuge (the "Refuge"). The Refuge is approximately 180 kilometers from the Site. An analysis of the Project's impacts on the Refuge is not required because the Refuge is more than 150 kilometers from the Site. The impacts from the Project on the closest Class I area are expected to be insignificant within the meaning of Rule 62-204.200(29).

29. DEP does not require Oleander to evaluate the cumulative impacts caused by the Project and other major sources of air pollution in the relevant Class II area. However, Oleander evaluated the Project's impacts together with the impacts of the Florida Power & Light Cape Canaveral Plant, the Orlando Utilities Commission's Indian River Plant, and the Orlando Utilities Commission's Stanton Energy Center. The Project itself will not have any measurable effect on the ambient conditions resulting from the operation of all of these sources.

30. DEP has adopted primary and secondary Ambient Air Quality Standards ("AAQS") in accordance with requirements adopted by the U.S. Environmental Protection Agency ("EPA"). Primary standards are designed to create an adequate margin of safety for the protection of the public health, including the health of the young, the old, and those with respiratory diseases such as asthma. Secondary standards are designed to protect the public welfare from any known or anticipated adverse effects of air pollution. AAQS are reviewed every five years by scientists and physicians in light of the most recent scientific studies and data.

31. In Brevard County, existing air quality is better than levels allowed under AAQS. Brevard County is classified as an attainment area.

32. Oleander analyzed the Project's potential impacts on ambient air quality in Brevard County in compliance with the applicable DEP requirements for such an analysis. Oleander's analysis was based on conservative assumptions intended to over-estimate impacts from the Project. For example, the analysis assumed that the Project would operate continuously throughout the entire year, even though the Project's annual operations will be limited to a maximum of 3,390 hours. In addition, Oleander assumed that the Project would use fuel oil for the entire year, even though the Project will be limited to firing fuel oil for a maximum of 1,000 hours per year.

33. The Project's maximum impacts on ambient air quality will be 0.6 percent or less of the applicable AAQS for each

criteria pollutant. Oleander's analysis demonstrates a wide margin of safety for public health and welfare.

34. The Project's maximum potential impacts are less than the EPA "significant impact" levels. Consequently, the Project's impacts are deemed insignificant from a regulatory perspective, and more detailed analyses of the Project's impacts on ambient air quality are not required under applicable PSD requirements.

35. The Project is not expected to cause any meaningful impacts on air quality in any neighborhood in Brevard County. In all neighborhoods, the Project's impacts on air quality will be insignificant. Similarly, the Project's impacts on soils, vegetation, wildlife, and visibility will be insignificant. The Project also will not cause any significant growth-related air quality impacts.

36. The cumulative impacts from the Project and other sources of air pollution in the area will be insignificant. When all of these sources are considered together, the maximum impact from their combined emissions will be 50 percent or less of the applicable AAQS.

37. The PSD program does not require Oleander to perform any ambient air quality monitoring for any pollutant prior to the time that construction of the Project commences because the Project's air quality impacts will be less than the applicable DEP de minimis levels. Pre-construction monitoring for ozone is not required unless a facility will have VOC emissions equal to or greater than 100 tons per year. The Project's maximum

potential VOC emissions will be 64 tons per year. Therefore, the Draft Permit does not require Oleander to install any ozone monitors.

38. DEP maintains two ambient air quality monitors in Brevard County to measure ozone concentrations. DEP also has ambient air quality monitors for ozone in Volusia, Seminole, Orange, Osceola, and St. Lucie Counties.

39. The ambient air quality data from DEP monitors demonstrate that the ozone concentrations in Brevard County are below the applicable AAQS. Further, the data demonstrate that ozone is a regional issue because the ozone levels in the region tend to rise and fall at the same time and to the same degree.

40. A requirement for Oleander to install an additional monitor in Brevard County would be unnecessary and unjustified. The impacts from the Project on ozone and other ambient air quality parameters are so small that the impacts could not be measured with an additional monitor. An additional monitor in Brevard County would provide no meaningful benefits when assessing whether Brevard County is meeting the AAQS for ozone and would cost between $75,000 and $100,000 a year to install and operate.

41. Emissions from the Project will not cause any significant impact on the water quality of water bodies in Brevard County. There will be minimal, if any, "fallout" of particles into nearby waters, including the St. Johns and Indian Rivers.

42. The maximum amount of nitrogen that could be deposited annually as a result of airborne NOx emissions from the Project is 0.0007 grams per square meter ("g/m^2"). By comparison, the current nitrogen deposition rate from other sources in the area is 0.4 g/m^2. Thus, the Project's impact on nitrogen deposition in the area will be only a fraction of the deposition that is occurring already.

43. Airborne emissions from the Project will not cause or significantly contribute to a violation of any ambient air quality standard or PSD increment. The Project complies with all applicable DEP air quality requirements, including the applicable policies, rules, and statutes.

CONCLUSIONS OF LAW

44. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties. The parties were duly noticed for the hearing.

45. Oleander has the ultimate burden of proof in this proceeding. Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981). Oleander also has the initial burden of presenting prima facie evidence that Oleander has complied with all of the applicable DEP standards and rules. J.W.C. 396 So. 2d at 788.

46. If Oleander presents the requisite prima facie evidence, Petitioner must present "contrary evidence of equivalent quality" proving the truth of the allegations in the Petition. J.W.C. 396 So. 2d at 789. Petitioner cannot satisfy his evidentiary burden with speculative concerns about potential

or possible adverse environmental effects. See Chipola Basin Protective Group, Inc. v. Florida Chapter Sierra Club, 11 F.A.L.R. 467, 481 (DER Final Order, May 29, 1988); J.T. McCormick v. City of Jacksonville, 12 F.A.L.R. 960, 971 (DER Final Order, January 22, 1990); Altman v. Kavanaugh, 15 F.A.L.R. 1588, 1576 (DOAH Recommended Order, adopted in pertinent part by DER Final Order, November 1, 1991).

47. Oleander presented competent substantial evidence that: (a) DEP properly determined BACT for the Project; (b) airborne emissions from the Project will not cause or significantly contribute to a violation of any ambient air quality standard or PSD increment; (c) airborne emissions from the Project will have no significant adverse impacts on water quality in any surface waters; (d) airborne emissions from the Project will not cause any significant adverse impacts on human health or the public welfare; (e) the Project satisfies applicable DEP rules and criteria; and (f) DEP should issue the air construction permit for the Project.

48. Petitioner failed to present "contrary evidence of equivalent quality" proving the truth of the allegations in the Petition. Petitioner speculated about potential impacts from the Project but presented no competent substantial evidence to support the allegations in the Petition.

49. During the administrative hearing, members of the public were allowed to enter comments on the record in accordance with Section 120.57(1)(b). In relevant part, Section 120.57(1)(b) provides:

> When appropriate, the general public may be given an opportunity to present oral or written communications. If the agency proposes to consider such material, then all parties shall be given an opportunity to cross-examine or challenge or rebut the material. (emphasis supplied)

50. DOAH is not the "agency" for purposes of Section 120.57(1)(b). DOAH is defined separately in Section 120.52(5) as the "Division." DEP is the "agency" for purposes of Section 120.57(1)(b). Compare, Section 120.52(1)(defining an "agency") with Section 120.52(5)(defining the "Division").

51. At the administrative hearing, five individuals were allowed to comment on the Project so that DEP would have the opportunity to hear additional comments from the public before DEP presented its recommendation at the final hearing regarding the Project. The five members of the public were not sworn or placed under oath because DEP stated that it did not propose to consider such material.

52. Unsworn testimony is not competent substantial evidence and cannot be used as the basis for a finding of fact. See Department of Environmental Regulation v. Chemairspray, Inc., 520 So. 2d 96, 97 (Fla. 4th DCA 1988); Leon Shaffer Golnick Advertising, Inc. v. Cedar, 423 So. 2d 1015, 1017 (Fla. 4th DCA 1982)("[t]rial judges cannot rely upon . . . unsworn statements as the basis for making factual determinations; and [an appellate] court cannot so consider them on review of the record"). Accordingly, the un-sworn comments made by the public at the administrative hearing cannot form the basis for a finding of fact in this case.

53. Even if the public comments at the hearing had been sworn testimony, the comments were not probative of the issues in this case. The five individuals who made public comments were not competent to express the opinions included in the public comments. Most of the individuals readily acknowledged that they are not experts regarding the subjects for which they offered opinions. See Warriner v. Doug Tower, Inc., 180 So. 2d 384 (Fla. 3rd DCA 1965)(testimony of expert on one subject was properly stricken where expert acknowledged he was not qualified to express an opinion regarding the issue in dispute). None of the individuals who offered comments at the administrative hearing established the required special knowledge, skill, experience, or training to be competent to offer opinion testimony on the technical issues involved in the evaluation of the Project. See also Sections 90.701 and 90.702. That portion of the public comments not comprised of opinion consisted of speculative concerns about either possible adverse environmental impacts or possible economic consequences for private property.

54. The Petition alleges that DEP should consider "environmental justice" issues when DEP evaluates the Project. Petitioner alleges that the proposed agency action is inconsistent with the provisions of President Clinton's Executive Order 12898, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." Executive Order 12898 is designed to focus the attention of federal agencies on "environmental justice."

55. Executive Order 12898 requires federal agencies to identify and address those situations where federal programs, policies, and activities have disproportionate adverse impacts on minority or low-income populations in the United States. Environmental justice complaints are also evaluated by EPA's Office of Civil Rights for compliance with Title VI of the Civil Rights Act of 1964, when such complaints are based on allegations of discrimination against minorities resulting from the issuance of certain pollution control permits.

56. The provisions of Executive Order 12898 are beyond the scope of this proceeding and beyond the jurisdiction of DEP and DOAH. Courts have consistently held that neither DEP nor DOAH has jurisdiction to consider the provisions of Executive Order 12898. See, e.g., Council of the Lower Keys v. Charley Toppino & Sons, Inc., 429 So. 2d 67, 68 (Fla. 3rd DCA 1983)(issuance of an air pollution permit by the Florida Department of Environmental Regulation "must be based solely on compliance with applicable pollution control standards and rules"; DER "is not required or authorized" to deny such permit because of alleged non-compliance with local zoning ordinances or land use restrictions); Taylor v. Cedar Key Special Water and Sewerage District, 590 So. 2d 481, 482 (Fla. 1st DCA 1991)(court adopted holding in Council of the Lower Keys, above, with regard to a water pollution permit, and then noted that "[r]emedies apart from the permitting scheme are available" to address the petitioner's claims); see also Miller v. Department of Environmental Regulation, 504 So. 2d 1325, 1327 (Fla. 1st DCA

1987) (when considering whether a project would adversely affect the "property of others," pursuant to DER's statutory authority in dredge and fill cases under Section 403.918(2), DER did not err by concluding that DER should not extend its review to include consideration of non-environmental impacts).

57. The issue in this proceeding is whether the Project complies with state requirements for the issuance of an air construction permit. Applicable requirements are set forth in Chapter 403 and Rules 62-4, 62-204, 62-210, 62-212, 62-214, 62-296, and 62-297. Nothing in the relevant statutes or rules allows either DEP or DOAH to enforce the requirements of Executive Order 12898.

58. The undersigned sustained DEP's objection to the submission of evidence by Oleander relevant to environmental justice issues. Consideration of such evidence would have lacked jurisdiction and would have been contrary to the law of the case established in previous rulings in this proceeding. Oleander proffered evidence that addressed environmental justice issues generally, as well as the Project's direct compliance with Executive Order 12898.

59. Apart from any issue of environmental justice, Oleander introduced competent substantial evidence to demonstrate that the airborne emissions from the Project will not have any meaningful adverse impacts on any neighborhood in Brevard County. In all neighborhoods, the impacts from the Project's emissions will be insignificant. The evidence also shows that the Project will be compatible with, and will not adversely affect, any residential

neighborhood. Residential neighborhoods are distant and well-buffered from the Site.

RECOMMENDATION

Based upon the findings of fact and conclusions of law, it is

RECOMMENDED that:

DEP enter a final order granting Oleander's application for an air construction permit for the Project, subject to the conditions and limitations contained in the Draft Permit.

DONE AND ENTERED this 27th day of September, 1999, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.