

Affidavit

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STATE OF FLORIDA

DIVISION OF ADMINISTRATIVE HEARINGS

CLARENCE ROWE,)
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Petitioner,)
)
vs.)
)
OLEANDER POWER PROJECT, L.P.,)
and DEPARTMENT OF ENVIRONMENTAL)
PROTECTION,)
)
Respondent.)
_____)

CASE NO.: 99-2581

* * * * *

AFFIDAVIT OF COURT REPORTER

I, DEBRA M. ARTER, Registered Diplomate Reporter, being first duly sworn, do swear on my oath as follows:

THAT I was the Court Reporter who did report the Administrative Hearing held in the above cause on August 30, 1999, at the Brevard County Government Center, 2725 Frank Jamieson Way, Viera, Florida; that said proceedings were transcribed by me under my direction and control.

THAT corrections have been made to the transcript pursuant to Exhibit 1, Numbers 1-8, 10-19, 21-48, 50-58, 60-74, 78-88, attached hereto, with the following additional corrections:

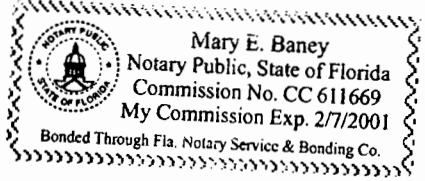
- Page 4, Line 7: Add "4" to Exhibits
- Page 66, Line 11: Change "injustice" to "justice"
- Page 67, Line 6 and 11: " " "
- Page 68, Line 9: " " "
- Page 69, Line 10 and 11: " " "
- Page 115, Line 18: " " "
- Page 204, Line 7: Add "4" to Exhibits.

1 THEREFORE, it is respectfully requested that
2 this Transcript of Proceedings with attached corrections be
3 filed in compliance with the Rules of Civil Procedure.
4 DATED THIS 20th day of September, 1999.

5
6 Debra M. Arter
7 DEBRA M. ARTER

8 SWORN TO AND SUBSCRIBED BEFORE ME THIS 20th
9 day of September, 1999.

10 Mary E. Baney
11 NOTARY PUBLIC
12 Commission Expires:



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Exhibit 1

1. Page 3, line 10: change "RICHARD" to "ROBERT"
2. Page 11, line 3: change "ROWER" to "ROWE"
3. Page 36, line 14: change "100,000" to "1000"
4. Page 50, line 16: change "Allender" to "Al Linero"
5. Page 54, line 6: change "interest" to "isn't"
6. Page 55, line 22: change "wavered" to "waiver"
7. Page 55, line 23: change "watering" to "monitoring"
8. Page 66, line 24: change "north" to "minority"
9. Page 68, line 25: change "position" to "motion"
10. Page 73, line 25: change "a critical" to "the correct"
11. Page 74, line 9: change "feel" to "fuel"
12. Page 76, line 2: delete "available"
13. Page 80, line 19: change "Liver" to "River"
14. Page 83, line 3: add "impact" after "environmental"
15. Page 83, line 21: add "you" after "Thank"
16. Page 87, line 2: change "MR. DEE" to "JUDGE"
17. Page 92, line 23: change "much" to "many"
18. Page 93, line 24: change "exhibit" to "compatibility"
19. Page 94, line 17: add "compatibility" after "use"
20. Page 107, line 13: change "foot" to "feet"

21. Page 117, line 21: change "is the" to "this"
22. Page 118, line 25: change "1898" to "12898"
23. Page 122, line 8: change ".24" to "2.4"
24. Page 123, line 17: change "out of" to "in"
25. Page 124, line 8: change "populous" to "populace"
26. Page 134, line 2: change "incidence" to "incident"
27. Page 135, line 15: change "PSD" to "project"
28. Page 147, line 21: change the "," to a "." and delete the "." after "80s"
29. Page 148, line 9: change "decrease" to "increase"
30. Page 151, line 6: change "pile" to "pit"
31. Page 152, line 19: change "plan" to "plant"
32. Page 153, line 13: change "error" to "air"
33. Page 156, line 24: change "plant" to "plan"
34. Page 158, line 15: change "internally" to "internationally"
35. Page 161, line 3: change "pollution" to "population"
36. Page 161, line 18: change "perfect" to "per"
37. Page 162, line 20: change "most" to "both"
38. Page 163, line 15: change "injections" to "injection"
39. Page 163, line 19: change "oils" to "oil"
40. Page 164, line 15: add a "." after pounds
41. Page 164, line 16: change "for" to "For"; change the "." after "opacity to a "," and change "Both" to "both"

42. Page 165, line 10: change "perfect" to "per"
43. Page 170, line 18: change "perfect" to "per"
44. Page 170, line 20: change "percent" to "parts"
45. Page 170, line 25: change "considering" to "concerning"
46. Page 173, line 3: change "2000" to "1000"
47. Page 173, line 9: change "experience" to "expensive"
48. Page 173, line 21: change "units" to "hours"
49. Page 174, line 2: change "that's" to "as"
50. Page 174, line 7: change "I" to "it"
51. Page 175, line 8: change "19" to "29" (compare with page 175, line 22 and page 176, line 16)
52. Page 175, line 22: change "35" to "30" (compare with page 175, line 8 and page 176, line 15)
53. Page 180, line 7: change "committee" to "comment"
54. Page 184, line 12: change "RICHARD" to "ROBERT"
55. Page 185, line 14: change "1993" to "1973"
56. Page 185, line 21: change "1993" to "1973"
57. Page 187, line 14: change "a" to "an expert"
58. Page 189, line 16: change "sustained" to "set"
59. Page 190, line 21: change "qualities" to "quality standards"
60. Page 191, line 9: change "theory" to "area"
61. Page 192, line 16: change "Orlando" to "Oleander"

62. Page 193, line 16: change "aversion" to "inversion"
63. Page 194, line ~~18~~¹⁴: change "arching" to "averaging"
64. Page 197, line 9: change ".6" to ".6%"
65. Page 203, line 10: change "RICHARD" to "ROBERT"
66. Page 205, line 7: change "Standard" to "Stanton"
67. Page 205, line 21: change "sulfur" to "sulfur dioxide"
68. Page 208, line 17: change "air" to "area"
69. Page 208, line 23: change "assistance" to "assisting"
70. Page 211, line 2: change "FCJ" to "FCG"
71. Page 211, line 13: change "25" to ".5"
72. Page 212, line 22: change "design to overcome to estimate" to "designed to over estimate"
73. Page 215, line 7: change "in reference" to "and references"
74. Page 215, line 18: change "documents in Section" to "sections in Exhibit"
75. Page 216, line 17: change "JUDGE" to "MR. DEE"
76. Page 216, line 20: change "production" to "sections"
77. Page 217, line 9: change "prepping" to "preparation"
78. Page 217, line 14: Start a new paragraph and add "MR. DEE:" after "Sure"
79. Page 219, line 16: change "cure" to "occur"
80. Page 233, line 1: change "March" to "May"
81. Page 233, line 24: change "available" to "available control"
82. Page 234, line 3: change "equaling" to "equal"

83. Page 235, line 8: change "PSD" to "in PSD"
84. Page 237, line 3: change "emission" to "permit"
85. Page 237, line 15: add "4" after "3" (compare with page 237, line 9)
86. Page 245, line 5: change "irrelevant" to "relevant"
87. Page 245, line 6: change "immaterial" to "material"
88. Page 249, line 22: change "objection" to "deposition"

1 I N D E X

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3 PUBLIC COMMENT:

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MARJORIE DERRICK 29

5

JAN MOODY 30

CRAIG BOCK 34

6

DOUGLAS SPAHR 54

TOM BERRINGER 59

7

OLEANDER'S WITNESSES: DIRECT CROSS REDIRECT RECROSS

8

RICHARD ZWOLAK 89 136 153

9

KENNARD F. KOSKY 155 177

10

ROBERT McCANN 184 218

11

AL LINERO 226 238

12

DEP'S WITNESSES:

13

NONE

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PETITIONER'S WITNESSES:

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JUANITA BARTON 269 272

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OLEANDER'S EXHIBITS:

ID EVIDENCE

7, 8, 12, 16, 17, 31, 34, 35, 36, 45, 46 132

14, 28, 29, 30, 1, 6, 9, 10, 13 176

15, 20-27, 37-44 217

2, 3, 4, 5, 11, 19, 32 237

DEP'S EXHIBITS:

NONE

PETITIONER'S EXHIBITS:

1 180

3 252

7 261

1 I mean on those witnesses by the Department.
2 Any questions?

3 MR. ROWE: Yes. I don't know if it's
4 a question, but -- oh, yes, it's a question.

5 I've been approached by a lot of the
6 citizens that have what I have referred to
7 as a vested right or Constitutional right in
8 reference to the freedom of speech. They
9 have asked to see if they would be given an
10 opportunity to bring their concerns to your
11 attention for consideration.

12 I did put that in writing to you. I
13 did not get a response to that concern.

14 Also, during a meeting on May the 13th,
15 both DEP attorneys did make it known that
16 the members of the community will be, would
17 be given an opportunity to speak before you
18 and that you would take their comments in
19 consideration.

20 In making this request, I would like
21 to --

22 JUDGE: Who said that?

23 MR. ROWE: The DEP attorney, as well
24 as Mr. -- what is his name, Mr. Halin, I
25 think his name is. I wasn't at -- I do

1 plant. The maximum particulate in an
2 isograph or whatever it's called, sir, I'm
3 no professional, certainly, there's an X
4 on my street showing the maximum particulate.

5 My daughter has asthma. Through study,
6 we see no other state that we can find on
7 the Internet that would allow a power plant
8 and light industrial, let alone one of this
9 size, through. Through our research, we
10 have found out that the initial 2,000 hours,
11 and our belief was it was going to take this
12 power plant over the 100 tons of VOCs which
13 should have provided on-site monitoring.
14 It was taken down to 10,000 after that.

15 A letter from DEP states that at any
16 time they could request more hours of oil
17 burning.

18 Here we are with what we feel is
19 already an unfair, you know, amount of
20 pollution from power plants in our area
21 because we have two already in our area
22 that the County Commission is working on
23 trying to change to gas power plants and
24 here we're going to allow another one
25 that has a tremendous amount of potential

1 that I repeated. And again, I can substantiate
2 by bringing in this information, I have it
3 with me today.

4 MR. DEE: But you claim no expertise
5 with regard to the issues that you've just
6 discussed.

7 MR. BOCK: Yes, sir, that's correct.

8 MR. DEE: That's all I need.

9 MR. BOCK: I guess our major concerns,
10 Judge, before I sit down and again, I
11 appreciate this time, again, it's a time
12 for a coward and I appreciate that, sir.
13 I say that humbly.

14 We don't feel, and I say we, many of
15 us people have discussed, we've been very
16 well treated by Mr. Al Linero, he has
17 answered questions. We don't feel DEP is
18 an agency that's protecting us, we feel
19 it's business as usual. We don't feel
20 Brevard County has protected us. Our
21 attorney has, John Harris has said going
22 into the moratorium it's illegal. We are
23 the people against all odds with no way
24 to win as we should.

25 Now, these facts which we stated are

1 to the people that are speaking here, I, too,
2 felt that that was in the form of intimidation.
3 We're not lawyers, we're not professionals --

4 JUDGE: Mr. Rowe --

5 MR. ROWE: Yes, sir.

6 JUDGE: -- this isn't your opportunity
7 for public comment.

8 MR. ROWE: Go right ahead, sir.

9 JUDGE: Mr. Spahr, anything different
10 other than what has already been said by Mr.
11 Bock?

12 MR. SPAHR: Yes, sir. Ms. Derrick and
13 Ms. Moody, I got different substance than
14 Mr. Bock.

15 JUDGE: Go ahead, state your name for
16 the record.

17 MR. SPAHR: My name is Douglas Spahr,
18 Cocoa, Florida, and I'm representing myself
19 here today and I don't purport to be an
20 air pollution expert. But I am a citizen
21 who did take the trouble to get the entire
22 Intent to Issue package, including such
23 things as the technical evaluation, preliminary
24 determination, so on and so forth.

25 And in one area of Florida here we do

1 have some Class One areas and the National
2 Park Service has permitting responsibility
3 for that area. And I did get a copy of
4 their permit application guidance for new
5 air pollution sources. And one thing that
6 interests me here, they're making a statement
7 here, says all assumptions for the analysis
8 should be explicitly stated with sufficient
9 information to be furnished to the National
10 Park Service (inaudible).

11 I went through it. They have a page
12 here, but it's all the significant happenings
13 with regard to this case. You know, letters
14 back and forth and so on and so forth. And
15 I was kind of surprised to see in there, I
16 saw no formal request from DEP or data to
17 do what the National Park Service thinks is
18 fundamental, duplicate their analysis.

19 Because this whole permit thing is
20 predicated on this, on this analysis and
21 they're using, you know, data from the
22 Orlando Airport estimates, the DEP waiver
23 requirement to do pre-construction monitoring,
24 so we're tied down to the healthy air we
25 believe is on the validity of a computer

1 that you identified as wishing to make public
2 comment, is that correct?

3 MR. ROWE: Those are some. There will
4 probably be some coming in later. Like I
5 said, a lot of these people have to work
6 and they do have to talk with their employers
7 in order to come here.

8 JUDGE: Okay. The other pending matter
9 that we have is Oleander's Motion to Strike.
10 That Motion, Mr. Dee, is, identifies phrases
11 such environmental justice, families and
12 grandchildren and citizens as the offensive
13 language.

14 MR. DEE: Yes, sir, and I would like
15 to supplement that before you rule on it.

16 JUDGE: Go ahead.

17 MR. DEE: With regard to the allegations
18 about Mr. Rowe's legal standing to represent
19 other people, that portion of the Motion, we
20 believe, is well-founded and should be
21 granted.

22 With regard to his allegations about
23 this project being a crass commercial venture
24 being foisted upon the local minority community,
25 we also believe that portion of the Motion

1 should be granted because the allegation is
2 purely speculative, it's clearly impertinent,
3 if not downright scandalous.

4 The third portion of that Motion,
5 though, deals with Mr. Rowe's concerns about
6 environmental justice. At this time I'm
7 going to withdraw that portion of the Motion.
8 We have taken Mr. Rowe's deposition on August
9 13th and at that time he made clear that
10 he intended to pursue his environmental
11 justice claims with U.S. Department of
12 Justice and EPA and anyone else who would
13 listen to him.

14 He's also made veiled reference to
15 his desire to take immediate appeal of
16 today's proceedings. Given the possibility
17 that Mr. Rowe will attempt to pursue an
18 appeal on those legal issues, we believe
19 that it is in our best interest to move
20 forward and address factual merits of the
21 allegations.

22 We believe that the issue is not
23 legally relevant in the sense that DEP
24 does not have the statutory authority to
25 address it. But in the event that someone

1 in a higher forum should disagree, we'd
2 like to have already covered the factual
3 merits of the claim because we believe
4 there is no factual support for the
5 allegation. So we're trying to cover
6 both sides of the issue.

7 And for that reason, we would ask
8 that you not strike the allegations of
9 environmental justice.

10 JUDGE: Okay, Mr. Goorland?

11 MR. GOORLAND: Well, Your Honor, one
12 part of the statement that Mr. Dee made
13 that I agree with was, I agree that, you
14 know, it is not part of our standard
15 permitting jurisdiction. And therefore,
16 I don't think it becomes a relevant issue.
17 And I'm talking, of course, about that
18 environmental justice position.

19 The rest of that --

20 JUDGE: Are you objecting to Mr. Dee's
21 withdrawal of that portion of the Motion?

22 MR. GOORLAND: Well, I don't object
23 to his withdrawal of the Motion. However --

24 JUDGE: It's only a portion of the
25 position.

1 MR. GOORLAND: However, I'd like the
2 record to reflect our position.

3 JUDGE: As a matter of law.

4 MR. GOORLAND: Yes.

5 JUDGE: Okay, Mr. Rowe --

6 MR. ROWE: Yes, sir.

7 JUDGE: -- the Motion, that portion
8 of the Motion to Strike addressing the
9 issues of the phrase "environmental
10 justice" has been withdrawn, but the
11 Motion remains with respect to that
12 portion of the Petition for Administrative
13 Hearing dealing with family, grandchildren
14 and citizens and gross commercial venture.

15 Do you wish to respond?

16 MR. ROWE: I'm not sure whether I
17 understand it, but -- could you give me
18 some clarifications? I thought he withdrew
19 his concern in reference to the subject.

20 JUDGE: The Motion to Strike moved to
21 strike three categories of language in the
22 Petition for Administrative Hearing.

23 MR. ROWE: All right, sir.

24 JUDGE: The first category was language
25 pertaining to environmental justice.

1 the issue is whether Oleander has provided
2 reasonable assurances to DEP that Oleander's
3 project will comply with the applicable DEP
4 rules under the DEP program for the
5 prevention of significant deterioration of
6 air quality.

7 The prevention of significant
8 deterioration, or PSD permit, that is at
9 issue in this case, would authorize the
10 construction of certain facilities that
11 are potential sources of airborne emissions.
12 In this case, those facilities include five
13 combustion turbines that would be used to
14 generate electricity at an electrical power
15 plant that Oleander plans to build here in
16 Brevard County. It would also include two
17 fuel storage tanks.

18 In this case, the evidence will
19 demonstrate that the Florida Department of
20 Environmental Protection has, indeed,
21 carefully reviewed Oleander's application
22 and reached a preliminary decision to
23 issue the PSD permit to Oleander. The
24 evidence will further demonstrate the
25 DEP's decision is the correct one and the

1 PSD permit should, indeed, be issued.

2 The combustion turbines that are
3 at issue in this case truly represent
4 state of the art technology. The turbines
5 are extremely fuel efficient. They will
6 use much less fuel than the existing fleet
7 of similar oil and gas-fired power plants
8 here in Florida.

9 They will -- by using less fuel, they,
10 in turn, will produce less in the way of
11 airborne emissions.

12 In addition, these new generation
13 combustion turbines have design features
14 that are pollution prevention features.
15 They prevent the airborne pollution from
16 being formed in the first instance.

17 This project will use natural gas
18 as its primary fuel. Natural gas is
19 the cleanest burning fossil fuel that's
20 commercially available today for the
21 generation of electricity. If natural
22 gas is not available, very low sulfur
23 fuel oil will be used as a backup fuel.

24 This project will be a peaking
25 power plant. It will provide power to

1 project must comply with DEP's best available
2 control technology. And indeed, the limits
3 that are being proposed in this case are
4 being used as a model for facilities
5 throughout the United States. They will
6 set the standard for other similar peaking
7 plants throughout the United States.

8 Now, Oleander has performed an
9 evaluation of the project's impacts on
10 ambient air quality. Oleander's analysis
11 was prepared in accordance with standard DEP
12 and EPA procedures and guidelines. That
13 analysis was very conservative. It
14 overestimates the potential impacts from
15 the project.

16 Even using a conservative analysis,
17 the evidence will demonstrate that the
18 project's maximum impacts on ambient air
19 quality will be less than one percent of
20 any of the ambient air quality standards
21 that are enforced by DEP. Those ambient
22 air quality standards were developed by
23 the United States Environmental Protection
24 Agency and, in turn, were adopted by the
25 Department of Environmental Protection.

1 mentioned, have been promulgated expressly
2 to protect human health and welfare.

3 Nonetheless, in an effort to respond
4 to these concerns, Oleander did an analysis
5 of the cumulative impacts associated with
6 this project when combined with the effects
7 of the other power plants in this region.
8 The evidence will show that those impacts,
9 whether viewing Oleander individually or
10 cumulatively with the other facilities,
11 there will not be any measurable or
12 meaningful change in ambient air quality
13 in this region as a result of the power
14 plant that Oleander has proposed.

15 Mr. Rowe also in his deposition has
16 raised questions about the project's
17 impacts on water quality in surrounding
18 lakes and streams such as the Saint John's
19 River and Indian River Lagoon. It should
20 be noted that normally DEP does not require
21 an applicant for a PSD permit to determine
22 whether the airborne emissions from its
23 source will cause adverse impacts on water
24 quality. Nonetheless, here, too, Oleander
25 has attempted to evaluate Mr. Rowe's concerns.

1 they have worked on many power plants around
2 the United States and they've worked on many
3 air pollution and environmental impact
4 statements throughout the globe, throughout
5 the world. Oleander's fourth witness will be
6 a representative of the Florida Department of
7 Environmental Protection, Mr. Al Linero.

8 Mr. Linero is also qualified to discuss the
9 issues that have been raised in this case.

10 He has approximately 20 years of
11 experience working on air pollution issues.
12 He will explain on behalf of the Department
13 why DEP has concluded that the permit should
14 be issued for this project.

15 So in summary, we believe the evidence
16 will overwhelmingly demonstrate that this
17 project complies with all of the applicable
18 DEP criteria and, for that reason, the
19 Department should issue the PSD permit that
20 is in question.

21 JUDGE: Thank you, Mr. Dee. Mr. Goorland?

22 MR. GOORLAND: No statement.

23 JUDGE: Mr. Rowe, opening statement?

24 MR. ROWE: As previously stated, I have
25 no expertise, neither am I a lawyer, but we

1 your first three witnesses going to take?

2 This is just a lunch scheduling issue,
3 so let's go off the record.

4 (Whereupon, discussion was held off the
5 record.)

6 JUDGE: Let's go back on the record.
7 We'll get to that, Mr. Rowe.

8 Mr. Dee, call your first witness.

9 Oh, and for the record, when you're
10 presenting expert testimony --

11 MR. DEE: Yes, sir.

12 JUDGE: -- have you, Mr. Rowe, have
13 you reviewed the qualifications of these
14 experts?

15 MR. ROWE: Sir, even if I did, it
16 really doesn't mean anything to me. I'm
17 just a common --

18 JUDGE: You have a right to object
19 to the qualifications of the experts, and
20 if you want to, if you want Mr. Dee, Mr.
21 Dee to lay those qualifications out on
22 the record as what we call laying a
23 predicate for the tender of the expert,
24 then that's your right to do that.

25 If you don't have any objection to

1 include utilities such as power plants and transmission
2 lines. It also involves other infrastructure such as
3 pipelines, highways, airports, landfills.

4 Another major component of my work during the 20
5 years has been the environmental assessment of those proposed
6 facilities on both the physical and biological environment as
7 well as on the cultural environment.

8 In addition, I have been responsible for seeking
9 permits and approvals from federal, state and local agencies
10 for those projects.

11 Q. What kinds of permits have you been responsible for
12 obtaining for these projects?

13 A. The permits that are typically required and that
14 I've been responsible for obtaining include air construction
15 permits, including prevention of significant deterioration,
16 including water use permits, waste water and storm water
17 permitting, dredge and fill permitting and comprehensive plan
18 amendments, rezoning and site plan approvals.

19 Q. How many -- approximately how many environmental
20 impact studies and environmental analyses have you performed
21 over the last 20 plus years?

22 A. Well over 200 studies.

23 Q. And how many projects have you worked on where
24 you've had to evaluate the environmental permitting and land
25 use issues concerning an electrical power plant or electrical

1 transmission line?

2 A. That would be well in excess of 20 studies.

3 Q. Has all of your work been performed here in
4 Florida?

5 A. It has not. Most of my work has been conducted in
6 Florida. However, I have worked in approximately 20 other
7 states as well as over half a dozen foreign countries.

8 Q. Has all of your work been performed for private
9 clients?

10 A. It has not. I have worked directly for federal
11 and state governments, agencies, including environmental
12 agencies, as well as local governments. That would be
13 counties as well as cities.

14 Q. Who employed you for your work overseas?

15 A. A number of clients, the most frequent of which was
16 the World Bank.

17 Q. Have you ever been qualified and allowed to testify
18 as an expert witness before?

19 A. I have, yes.

20 Q. And what areas have you addressed in your testimony
21 as an expert witness?

22 A. In previous proceedings, I've qualified as an
23 expert in environmental planning, resource planning, land use
24 compatibility analysis, environmental impact analysis and
25 socioeconomic analysis.

1 Q. Have you ever appeared before any regulatory body
2 or agency to render opinions concerning the environmental
3 impacts associated with an electrical power plant?

4 A. Yes, I have. I've appeared before federal, state
5 and local agencies to either present findings of our studies
6 or to seek approval for projects.

7 Q. Mr. Zwolak, I've previously showed you Exhibit 16.
8 Is Exhibit 16 a true and correct copy of your resume'?

9 A. Yes, it is.

10 Q. Does your resume' accurately summarize your
11 academic and professional accomplishments?

12 A. It does, yes.

13 MR. DEE: Your Honor, at this time we
14 would proffer Mr. Zwolak as an expert
15 concerning land use planning --

16 JUDGE: Go ahead.

17 MR. DEE: -- land use compatibility
18 analyses and socioeconomic and environmental
19 impact assessments.

20 JUDGE: Mr. Goorland, any objection?

21 MR. GOORLAND: No objection, Your Honor.

22 JUDGE: Mr. Rowe, any objection?

23 MR. ROWE: No objection.

24 JUDGE: The Witness is accepted as an
25 expert for the purposes tendered without

1 has he replied, but he has continued to make
2 it clear in his deposition that he wants
3 to pursue this issue with EPA and the
4 Department of Justice.

5 And we're simply trying to address
6 the issue now on the facts and we intend
7 to address it legally, as well, in our
8 post hearing submittals. To ensure that,
9 whether it's relevant or not, we've
10 addressed the merits of his concern.

11 JUDGE: The Order granted the Motion
12 to Dismiss and it rendered the Motion to
13 Strike moot.

14 MR. DEE: Yes, sir.

15 JUDGE: The Motion to Dismiss has
16 stated as one of its grounds that Petition
17 allegedly, made allegations of environmental
18 justice, over which this forum has no
19 jurisdiction.

20 MR. DEE: That was the allegation we
21 raised. You never got to the merits of
22 that allegation because you ruled that the
23 pleading was insufficient as a matter of
24 law.

25 JUDGE: Okay. Anything further, Mr.

1 purposes. But again, I will say I have
2 no objection if they wish to show the
3 relationship with the community.

4 JUDGE: Mr. Rowe, any response on
5 the objection?

6 MR. ROWE: I would request that it
7 remain as a part of the Complaint as stated.

8 JUDGE: Okay. Well, we're -- that's
9 not at issue.

10 MR. ROWE: It's not? Okay.

11 JUDGE: The issue is there's an
12 objection to a specific question.

13 MR. GOORLAND: And it's a standing
14 objection, Your Honor, to a line of
15 questioning.

16 JUDGE: Anything further, Mr. Rowe?

17 MR. ROWE: No, sir.

18 JUDGE: The objection is sustained.

19 MR. DEE: Your Honor, may we proffer --

20 JUDGE: Yes --

21 MR. DEE: -- the testimony?

22 JUDGE: -- you certainly may.

23 MR. DEE: All right.

24 JUDGE: Note for the record when
25 you're completed with the proffer.

1 MR. DEE: Yes, sir.

2

3 PROFFERED DIRECT EXAMINATION

4 BY MR. DEE:

5 Q. Mr. Zwolak, did you perform an assessment of
6 whether this project would cause adverse impacts on minority
7 and low-income neighborhoods?

8 A. Yes, I did.

9 Q. And why did you perform this work?

10 A. During the spring of 1998, we were conducting a
11 visual impact assessment. And part of the requirements of
12 that methodology was to drive all public rights-of-way within
13 a several-mile radius of the project site.

14 It was at that time that we noticed that there was
15 a community south of State Road 520 that had a racial
16 minority.

17 So I disclosed our discovery to Oleander and
18 suggested that they conduct a study, and they immediately
19 authorized us to proceed.

20 Q. What criteria did you use when trying to determine
21 whether the project would adversely affect any minority or
22 low-income neighborhoods?

23 A. Well, we initially looked at the Executive Order
24 dealing with environmental justice, that's Executive Order
25 12898, Federal Actions Affecting Environmental Justice in

1 Have you tried to determine where the maximum air quality
2 impacts from this project will occur?

3 A. Yes.

4 Q. All right. Approximately how far from the site
5 will those impacts occur?

6 A. They vary, depending upon the parameter that's
7 evaluated. The maximum impacts range anywhere from .25 miles
8 to 2.4 miles.

9 Q. All right, I'd like you to turn to Exhibit 33 and
10 look at Table 3 and explain the analysis that you performed
11 concerning the project's air quality impact on minority and
12 other neighborhoods.

13 A. Exhibit 33 is a report entitled Environmental
14 Justice Assessment Constellation Power Development, Inc.,
15 Oleander Power Project. Table 3 is found on Page Six.
16 And -- just one page from the back of the report.

17 And it identifies for each air quality parameter
18 the direction and distance of the maximum concentration. It
19 identifies the value of that concentration, its comparison to
20 state ambient air quality standards.

21 And it also identifies the racial characteristics
22 of that location as defined by census tract, block group
23 data.

24 Q. Can you summarize the findings that are found in
25 that Table?

1 A. Yes, in summary, the most significant concentration
2 of air emission from the proposed project would be .6 percent
3 of the State's ambient air quality standard.

4 The evaluation also identifies that for the one
5 parameter whose worst case falls within the community to the
6 southeast of the site, that concentration would be one
7 twentieth of one percent of the State's ambient air quality
8 standard.

9 Q. So you looked at eight scenarios and seven of the
10 situations that you evaluated the maximum impacts occurred in
11 communities that are not minority communities?

12 A. That is correct. With the one exception of the,
13 one of the eight parameters, the percent minority as
14 determined by the census bureau is anywhere from 0 percent to
15 2 percent minority population.

16 Q. So if the maximum impacts occur in non minority
17 communities in seven out of eight scenarios, what conclusions
18 can you draw as to whether the project will have a
19 disproportionate impact on minority neighborhoods?

20 A. This evaluation suggests that there would not be
21 any disproportionate impact on minority populations.

22 Q. Now, you've mentioned that you've compared these
23 maximum impacts to ambient air quality standards. Do you
24 know whether those standards are designed to protect human
25 health and welfare?

1 A. They are, they're designed to protect human health
2 and welfare for all citizens. That would include young and
3 old, as well as those that are less healthy due to other
4 types of medical problems.

5 Q. If the maximum impacts in all cases are less than
6 one percent of the applicable standard, what conclusions did
7 you draw concerning the project's impacts on air quality and
8 the populace in Brevard County?

9 A. I would conclude that there is negligible impact of
10 the proposed project on all of the residents of Brevard
11 County.

12 Q. All right, sir. Now, you've referred to Exhibit
13 Number 33.

14 A. Yes.

15 Q. To the best of your knowledge, are the statements
16 contained in that Exhibit true and correct?

17 A. They are.

18 Q. And do you adopt those statements as part of your
19 testimony today?

20 A. I do.

21 Q. Have you ever prepared similar environmental
22 assessments before concerning environmental justice issues?

23 A. Yes, I have.

24 Q. And were your findings in those cases accepted by
25 the appropriate regulatory agencies?

1 A. His findings were that in his professional career,
2 he had never come across that incident to occur.

3 Q. So he does not expect that to occur in this case?

4 A. Correct, correct. Given the absence of species on
5 site, where threatened species might be, the known corridors
6 in Brevard County, and where the site is located, he would
7 expect that that would not occur, there would be no impact
8 from migration as well as occupancy on the site.

9 Q. As a land use planner, have you considered whether
10 this development is compatible with surrounding land uses?

11 A. Yes, I have.

12 Q. And what is your conclusion concerning that issue?

13 A. That the proposed project is compatible with the
14 immediately adjacent land use, that being
15 industrial/commercial. It is also compatible with the
16 residential uses that are quite some distance away from the
17 industrial/commercial area.

18 Q. Have you considered the potential impacts
19 associated with truck traffic going to and from the site?

20 A. Yes.

21 Q. Could you summarize your conclusions concerning
22 truck traffic.

23 A. During the middle portion of 1998, we conducted a
24 traffic impact assessment that evaluated the ability of the
25 existing infrastructure, this being primarily State Road 520,

1 to accommodate both construction and operation traffic during
2 the a.m. and p.m. peak hours.

3 And we found that the, both State Road 520 and
4 Townsend Road operate at a very high level of service. That
5 level of service would be an indicator of a lack of
6 congestion both with and without the project.

7 Supplementing that work, we also evaluated the
8 entire route alternatives from the Port of Cape Canaveral to
9 the project site to determine if specifically fuel oil trucks
10 would have an impact, an adverse impact on the highway
11 corridor.

12 Q. In the course of your work on this project, have
13 you formed a professional opinion as to whether the PSD
14 permit -- excuse me, have you formed a professional opinion
15 as to whether the project satisfies the DEP criteria for the
16 issuance of the PSD permit?

17 A. As Project Manager, I relied on my resource staff
18 who developed the draft documents which I reviewed and
19 approved during the course of the project.

20 Q. What is that opinion?

21 A. My opinion is that the proposed project does comply
22 with the applicable standards.

23 Q. You heard the public comments that were offered
24 this morning. Was there anything said this morning that
25 would change your opinion concerning the issuance of the PSD

1 Q. In reference to the alleged wetlands in that
2 particular area, can you still build in the wetlands,
3 or -- first of all, are there wetlands, is there wetlands
4 there?

5 A. I can refer to an Exhibit and show you more
6 clearly.

7 Q. Yes, please.

8 A. I'll refer to Exhibit 46, which is an aerial
9 photograph of the project site. Most of the wetlands on site
10 that occur naturally are located in the southwest portion of
11 the project site both north and south of Townsend Road.
12 Those wetlands will not be impacted by the project.

13 The wetlands that will be impacted by the project
14 include a drainage ditch that runs north/south through the
15 center of the property and a portion, not all, but a portion
16 of the eastern third of the site.

17 Now, this historically included some natural
18 uplands as well as upland areas. What occurred is, as you
19 can see, this area has already been impacted by previous
20 development. This area was scraped in the '70s when the
21 borrow pit was dug out. In the late '70s and '80s, it was
22 used as a location for open storage.

23 And what happened is when this area was graded, it
24 was graded flat without the ability to convey storm water off
25 the site quickly. So wetland plants now have come up and

1 occupied portions of this eastern area.

2 The project impacts will primarily be to this ditch
3 and areas from the center of the project site out a bit
4 toward the east.

5 A lot of the disturbed wetland that's located on
6 the eastern portion of the site will be used as a buffer area
7 for use to the east and will be used, will enhance that area,
8 both the natural wetland and the artificial wetland to
9 increase its diversity in wildlife habitat.

10 Q. Okay, thank you. You say that there will be some
11 regulatory audit keeping in reference to fuel hours burned,
12 gas, et cetera.

13 A. Yes.

14 Q. Who will maintain those records, DEP or a higher
15 authority?

16 A. To my knowledge, they'll be maintained both by the
17 operator of the plant and by the Department of Environmental
18 Protection.

19 Q. At the state level or the federal level?

20 A. State.

21 Q. Does the federal level ever come in and oversee the
22 state, or is that just a no-no?

23 A. Not to my knowledge; but perhaps the second witness
24 can speak more to that.

25 Q. Okay. I think you testified that there were no

1 Q. And they never saw any birds that were being
2 commented about today.

3 A. That's correct.

4 Q. Okay. You said there's a drainage ditch there. Is
5 that drainage ditch used for storm water to go into that rock
6 pit? What is the purpose of that ditch?

7 A. The -- I'll refer again to Exhibit 46. The ditch
8 that's located in the central portion of the property
9 essentially drains rainwater from the property itself.
10 Because of the elevations to the north of the site, the
11 disturbed and developed areas east of the site and I-95 to
12 the west, the drainage for the site is essential to the site
13 itself.

14 Eventually, this discharge goes underneath
15 Interstate 95 and then into State Road 520 right-of-way.

16 Q. So you won't be disturbing any of that area there,
17 you'll be building, more or less, to the, closer to yourself
18 there.

19 A. Correct, the footprint of construction is limited
20 to this area of pine flat woods on the western half of the
21 site and then the disturbed areas that are in the east
22 central portion of the site.

23 Q. Thank you, sir. Of all that water that you're
24 using running through that system, how much of that water,
25 if you can say hypothetically, I don't know what I'm talking

1 about, if you put a gallon in there, how much of that will go
2 up in evaporation?

3 A. Probably 98, 99 percent.

4 Q. 98, 99 percent. And how much water's going to be
5 running through that system a day?

6 A. 121,000 gallons a day when the plant is operating
7 on natural gas for a 17-hour period. It could be
8 substantially less if the operation is of shorter duration.
9 It would be more, obviously, if it ran greater than 17 hours.

10 Q. But it is anticipated it will run 17 hours a day?

11 A. One of the design bases for the project is a
12 17-hour operational day.

13 Q. How much will it deal with in oil, is there a
14 change in the figures there? Would it use more or less?

15 A. The operation on fuel oil would result in an
16 increase in the use of water.

17 Q. And how much less in burning oil?

18 A. Well, it would be more than oil -- I'm sorry, it
19 would be more than natural gas. If the plant were to operate
20 17 hours a day on natural gas, water consumption would be
21 approximately 1,115,000 gallon.

22 Q. And if it was burning oil, how much water
23 consumption would be utilized?

24 A. That was the number I just mentioned.

25 Q. That was oil.

1 A. I'm sorry, I misunderstood you.

2 Q. That was oil.

3 A. Yes.

4 Q. And could you repeat that figure again for the
5 natural gas?

6 A. Yes, for natural gas, based on a 17-hour day,
7 anticipated water use would be 121,000 gallons per day.

8 Q. You have classified yourselves as a Title V
9 company. What kind of pollutants will be produced?

10 A. Golder is not a Title V company.

11 Q. No, no, not you, Oleander Power Plant is.

12 A. Okay.

13 MR. DEE: Mr. Rowe, the air issues
14 will be addressed by the next two witnesses.

15 MR. ROWE: Sorry about that.

16 THE WITNESS: That's okay.

17 MR. ROWE: I think that concludes my
18 questions.

19 JUDGE: Redirect.

20 MR. DEE: Yes, sir, just very briefly.

21

22 REDIRECT EXAMINATION

23 BY MR. DEE:

24 Q. Mr. Zwolak, do you know whether the United States
25 Environmental Protection Agency has recommended guidelines

1 Q. What does that mean when you say you're a
2 principal?

3 A. I'm a senior level person involved in the review
4 and conducting of various environmental studies. My
5 specialty is air pollution control, specifically working with
6 electrical power plants.

7 Q. What academic training do you have for your work on
8 power plants?

9 A. I have a Bachelor's of Science in Engineering,
10 1970, from Florida Atlantic University, a Master's of
11 Science, 1976, from University of Central Florida. I have
12 a year and a half, completed all my course work for a Ph.D
13 at the University of Central Florida and have conducted, been
14 present at EPA-sponsored training programs on air pollution
15 control and air pollution studies.

16 Q. Approximately how many years have you worked on air
17 pollution control issues?

18 A. Twenty-nine years.

19 Q. Could you just summarize your work experience with
20 regard to air pollution control issues.

21 A. I started my career in 1970 working for the
22 predecessor of the Environmental Protection Agency. I was
23 actually assigned to the State of Florida developing the
24 first air pollution plan.

25 In April, '72, I was employed by the predecessor

1 As a professional engineer, I've been involved in
2 hundreds of air pollution projects principally involving the
3 preparation of the air pollution permits, PSD permits for
4 electric power plants. I've been involved in probably 30,000
5 megawatts of different types of studies.

6 Q. All right, sir. Has all of your work occurred here
7 in Florida?

8 A. No, it hasn't.

9 Q. Could you give us an idea of other locations where
10 you've worked.

11 A. I've worked primarily in Florida since 1970. I
12 have worked in other states, other southeast states, as well
13 as the state of Maryland and the midwest.

14 I've also worked in power plant development
15 internationally, being a consultant for the World Bank in
16 Pakistan as well as various projects throughout the world.

17 I've worked in China, Jamaica, Dominican Republic,
18 Buenos Aires, Argentina, and Brazil.

19 Q. Did you also work for the U.S. Agency for
20 International Development on these kinds of projects?

21 A. Yes, as a direct contractor evaluating and
22 performing environmental studies.

23 Q. Have you ever performed any analyses of the best
24 available control technology for the various sources of air
25 pollution?

1 the Environmental Protection Agency starting in 1970 as a
2 means to protect the general public health and welfare of the
3 general population with an adequate margin of safety. It's
4 where people breathe.

5 Generally, these types of standards are established
6 in units of mass per unit volume.

7 The second aspect of air quality management is
8 really emission standards of some type. Emission standards
9 can be set in a couple ways. One is to establish an emission
10 standard to meet an ambient standard, or they could be
11 technology based.

12 Technology-based standards were promulgated by EPA
13 starting in the early '70s as new source performance
14 standards. That is, for new sources, they have to meet these
15 more stringent base technology standards.

16 These standards are typically given in units that
17 are common to the type of industry for a combustion turbine.
18 It's in parts per million by volume.

19 Q. Let's go back to the Oleander Power Project. Can
20 you just briefly describe the type of combustion technology
21 that will be used in this case and the fuels that will be
22 used.

23 A. The Oleander Power Project will use combustion
24 turbines that are manufactured by the General Electric
25 Company. The model is the Frame 7FA combustion turbine.

1 It's an industrial -- heavy industrial turbine that works
2 on a same principle as a jet engine, albeit more complicated.

3 The engine will burn primarily natural gas with a
4 limit of 3,390 hours per year with a backup fuel of oil, and
5 that's going to be limited to an equivalent of 1,000 hours
6 per year.

7 Q. What Can you tell us about the state of your
8 knowledge about combustion turbines, and these GE turbines
9 in particular, how advanced are they?

10 A. These combustion turbines will be the most advanced
11 for peaking service in Florida. Much improvements have been
12 made in the technology of combustion turbines to make them
13 more and more efficient.

14 They also use a type of air pollution control
15 technology that's called Dry Low-No_x, usually called DLN,
16 that will be used to control the emissions when combusting
17 natural gas. And when combusting oil, water injection will
18 be used.

19 If you look at the fleet of turbines in Florida,
20 these will be clearly the most efficient in terms of both
21 emissions as well as producing power.

22 Q. Now, you've mentioned that this project will be
23 limited to operating a maximum of 3,390 hours per year. How
24 many hours are there in a year?

25 A. There's 8,760 per year.

1 Q. What will happen during those other hours in this
2 instance?

3 A. The plant would not operate for those hours.
4 Essentially, 60 percent of the time the plant just wouldn't
5 operate at all.

6 Q. Would there be any airborne emissions during 60
7 percent of the time?

8 A. No.

9 Q. Now, how will the air pollutant emissions be
10 controlled at the Oleander Power Project?

11 A. As I mentioned briefly, there's various pollutants
12 that could be emitted and the technology that's incorporated
13 into the General Electric turbines are the DLN technology,
14 and that will control nitrogen oxides when combusting the
15 natural gas, and water injection when combusting the oil.

16 Also, pollutants such as particulate matter and
17 sulfur dioxide which are more from the impurities in fuel
18 will be very low. Natural gas is the cleanest of fossil
19 fuels. And the type of oil that will be used is also very,
20 very clean.

21 Other pollutants such as carbon monoxide and
22 volatile organic compounds are controlled in the combustion
23 process itself.

24 Q. Okay, could you take a look at Exhibit 28 and use
25 that Exhibit to describe for us the type and amounts of air

1 pollutants that will be emitted from the Oleander Power
2 Project.

3 A. All right, Exhibit 28 shows the emissions of the
4 Oleander Project for the major air pollutants that would be
5 emitted by the project. The first column has the five major
6 pollutants, particulate matter and PM₁₀. PM₁₀ is particulate
7 matter with the aerodynamic diameter less than ten microns.
8 Sulfur dioxide, nitrogen oxide, carbon monoxide and volatile
9 organic compounds.

10 Of the five, the emission will be slightly
11 different on gas and oil. And then there will be different
12 emission rates. What I've shown in the Exhibit in the third
13 and fourth column is the emission level consistent to what is
14 normally indicated in the type of technology.

15 For particulate matter, for example, it's in
16 pounds. For opacity, both fuels will have what's called 10
17 percent opacity. For nitrogen oxide, carbon monoxide and
18 VOC's, it's in parts per million, that is so many parts by
19 volume in a million parts of air.

20 Also, in the table it shows pounds per million BTU,
21 pounds per in CT, which is part of the permitting process as
22 well as tons per year and tons per year for the overall
23 project. That's used mainly in items of regulatory criteria
24 and is somewhat misleading when the, particularly when you're
25 dealing with something like a gas.

1 For example, the combustion turbine actually uses
2 air as its working fluid. And for each hour it operates, it
3 will actually process 3.5 million pounds of air. If it were
4 to operate the whole year, it's something like six million
5 tons.

6 So sort of put in perspective, some of these
7 emissions with respect to the new source performance
8 standards that I had mentioned earlier, there are two that
9 are important. One is for nitrogen oxide. The proposed
10 natural gas limit is nine parts per million by volume with
11 a correction for oxygen. The actual limit, new source
12 performance standard limit that the EPA has promulgated and
13 the EPA has adopted is over 100. So it's a factor of ten.

14 Similarly, for sulfur dioxide it's a percentage of
15 fuel. It's going to be 16 to about 400 times less than the
16 new source performance standard. For example, on oil,
17 the -- in the event it is operated, it's .05 percent sulfur
18 at the Oleander Project. The new source performance standard
19 for the project limit is .8, so well over a factor of 10.

20 Q. Let me go back for just a second very quickly. You
21 mentioned CT, does that mean the combustion turbine?

22 A. Yes, combustion turbine.

23 Q. You talked about 10 percent opacity, is that an
24 emission limit that will be imposed on this facility?

25 A. Yes, it is.

1 summarize your findings and your BACT analysis for each of
2 the pollutants that you evaluated.

3 A. Exhibit 30 is a summary of the best available
4 control technologies for the major pollutants. What was
5 concluded was that the Dry Low-NO_x, or DLN technology, for
6 natural gas and water injection for oil were the best
7 combustion technologies for nitrogen oxides, carbon monoxide
8 and volatile organic compounds.

9 For pollutants that are involved in impurities in
10 the fuel, it was natural gas and low sulfur distillate oil,
11 which includes particulate matter and sulfur dioxide
12 considerations.

13 Q. All right, does the BACT determination result in
14 the establishment of an emission limit?

15 A. Yes, it does.

16 Q. All right, sir. What emission limits were
17 established as BACT in this case for the control of NO_x?

18 A. For NO_x, a BACT limit of nine parts per million by
19 volume dry collected to -- corrected to 15 percent O₂ when
20 firing natural gas and 42 parts per million again corrected
21 to 15 percent oxygen for distillate oil. And that's using
22 Dry Low-NO_x technology for gas and water injection for oil.

23 Q. All right, sir, before we broke for lunch, Mr. Rowe
24 was asking Mr. Zwolak about comments that were apparently
25 submitted by the U.S. Fish and Wildlife Service concerning

1 originally 2,000 hours, the same maximum limit of operation,
2 but within that 2,000 hours of oil, and that was decreased to
3 1,000 hours of oil.

4 Q. Does Oleander have any economic incentives to want
5 to reduce the use of fuel oil?

6 A. Yes, they do. There's actually two factors that
7 are involved and both together increase the cost of burning
8 oil by 35 to 50 percent on the same basis of gas. One factor
9 is oil is just more expensive.

10 And secondly, the water and everything else, the
11 maintenance adds to that cost.

12 Q. Oleander would have to buy water when it's burning
13 natural fuel oil?

14 A. Effectively, yes. Even if they're getting water,
15 you have to treat it because the water that's being used is
16 essentially pure, pure water. So you make it, it has a cost.

17 Q. How do the limits on fuel oil in this case compare
18 to the limits imposed on other power plants?

19 A. It's actually lower than most plants. If you look
20 at probably well over 1,000 megawatts of simple cycles
21 permitted in the 1990s, the average is more like 2,000 hours
22 of operation for those units. This is actually lower than
23 those facilities.

24 Q. Have you reviewed Exhibit 11, which is the draft
25 for the permit for the Oleander Power Project?

1 A. Yes, I have.

2 Q. If the project is built and operated that's
3 described in the application that has been submitted to the
4 DEP, will the project be able to comply with all the
5 conditions and emission limits contained in DEP's draft
6 permit?

7 A. Yes, it can.

8 Q. Can the GE combustion turbines that are being
9 proposed in this case comply with DEP's combustion limits?

10 A. Yes.

11 Q. Can Oleander hire or staff their own plant to be
12 in compliance with the DEP permit limits?

13 A. Yes, these type of combustion turbines are highly
14 automated. Having been to engineering school with a slide
15 rule, the difference is between having valves and having
16 computer screens. Power plants today have all computer
17 screens and all the control equipment is fully automated.

18 The parent company of Oleander has an institution
19 where they actually -- the environmental people train the
20 operators in how to operate, and there will be what's called
21 continuous emission monitors monitoring the pollutants from
22 the stacks so they'll know how they're operating at any time.

23 Q. Did you prepare any sections of Exhibit One, which
24 is the air permit application submitted to DEP for the
25 project?

1 A. Yes, I did.

2 Q. All right. Did you prepare or assist with the
3 preparation of Exhibits 6, 9, 10 and 13, which are letters
4 and materials from Golder to DEP concerning this project?
5 That would be 6, 9, 10 and 13.

6 A. Yes.

7 Q. All right, now, during your testimony you've
8 discussed Exhibits 14, 28, 29 and 30. Did you prepare all
9 of these exhibits?

10 A. Yes, I did.

11 Q. With regard to all of these Exhibits that I've just
12 mentioned, all of these Exhibits that you've prepared, are
13 the statements in those documents true and correct, to the
14 best of your knowledge?

15 A. Yes, they are.

16 Q. Do you adopt the statements in those documents as
17 part of your testimony here today?

18 A. Yes, I do.

19 MR. DEE: Your Honor, at this time we
20 would like to move the following Exhibits
21 into evidence: It would be Exhibits 1, 6, 9,
22 10, 13, 14, 28, 29 and 30.

23 JUDGE: You didn't mention 11.

24 MR. DEE: That's a letter from DEP.

25 We'll have another witness address that.

1 In addition, Exhibit 13 is Golder's
2 response back to the Florida Department of
3 Environmental Protection concerning these
4 comments from U.S. Fish and Wildlife Service.

5 So Mr. Kosky's testimony is consistent
6 with the information he previously provided
7 to DEP concerning this comment.

8 JUDGE: Well, Mr. Rowe has moved a
9 document, I guess it's Petitioner's One?

10 MR. ROWE: It could be, yes, sir, whatever
11 you deem appropriate. Is that Petitioner or
12 Exhibit?

13 JUDGE: It's an exhibit and I'm identifying
14 it as Petitioner's Exhibit One.

15 MR. ROWE: Okay.

16 JUDGE: Mr. Dee?

17 MR. DEE: We have no objection.

18 JUDGE: Mr. Goorland?

19 MR. GOORLAND: No objection.

20 JUDGE: Petitioner's One as identified
21 is admitted on the record without objection.

22 (Whereupon, Petitioner's Exhibit Number One was
23 marked and received in evidence.)

24 JUDGE: Go ahead, Mr. Rowe.

25

1 questions.

2 Judge: Redirect?

3 MR. DEE: No, sir.

4 JUDGE: Thank you, you're excused
5 from your oath, you're excused as a
6 witness.

7 Call your next witness.

8 MR. DEE: At this time Oleander would
9 call Mr. Robert McCann, Junior

10

11 WHEREUPON,

12

ROBERT McCANN,

13 being first duly sworn by the Court Reporter to tell the
14 whole truth as hereinafter certified, was examined and
15 testified under the oath as follows:

16 JUDGE: State your first and last
17 name and spell each name for the record.

18 THE WITNESS: Robert, McCann, R O B E R T,
19 McCann, M C C A N N.

20 JUDGE: Mr. Dee.

21 DIRECT EXAMINATION

22 BY MR. DEE:

23 Q. Are you familiar with the Oleander Power Project
24 that is the subject of this proceeding?

25 A. Yes, I am.

1 Q. Could you tell us just tell us briefly why you're
2 familiar with it?

3 A. I was involved in preparing the air quality impact
4 assessment for the project.

5 Q. Where are you employed?

6 A. I'm employed at Golder Associates, Incorporated.

7 Q. And what are your general duties and
8 responsibilities at Golder?

9 A. I'm an associate and Manager of the Air Resources
10 Group. This group consists of professionals who perform work
11 in air dispersion modeling, air permitting and monitoring of
12 air pollutants and noise.

13 Q. What academic training do you have for your work?

14 A. I have a Bachelor of Science in Meteorology in 1973
15 from Lowell Technological Institute out of the University of
16 Massachusetts at Lowell.

17 Q. How many years of experience do you have working on
18 air pollution issues?

19 A. About 25 years.

20 Q. Could you summarize your work experience for us?

21 A. Yes, after graduation from college in 1973, I
22 worked at Environmental Research and Technology, now known
23 as ENSR, E N S R, in Lexington and Concord, Massachusetts.
24 I was a staff scientist, Project Manager and Assistant
25 Manager of the Air Impact Section within the Air Quality

1 Q. Have you taught any professional courses in your
2 field?

3 A. I've taught several air dispersion modeling courses
4 for both private industry as well as public workshops in the
5 United States as well as foreign countries such as Argentina
6 and the Dominican Republic. For those courses, I instructed
7 professionals who were evaluating the air quality effects for
8 permitting purposes such as PSD or non attainment provisions.

9 Q. Have you ever been qualified to testify as an
10 expert witness in any proceeding?

11 A. Yes, I have.

12 Q. Could you just tell us generally what was it you
13 addressed in those cases?

14 A. I was qualified as a expert in the field of
15 meteorology and air quality impact quality assessments for
16 eight site certification hearings. Over the last 12 years,
17 13 years, these involved site certifications for the Seminole
18 Electric Company, Hardee Unit 3 facility in 1995, the
19 original units, Hardee 1 and 2 in 1990. In 1985 and 1986 in
20 Broward County the resource recovery facilities and then
21 several others in the State of Florida.

22 Q. I'd like you to take a look at Exhibit 15 and tell
23 me if that's a true and correct copy of your resume'.

24 A. Yes, it is.

25 Q. Does your resume' accurately summarize your

1 A. The basic purpose is to protect the general health
2 and welfare of the public. There are two types of air
3 quality standards, primary standards and secondary standards.

4 The primary standards are designed to protect the
5 public health, while the secondary standards are designed to
6 protect the public welfare with an adequate margin of safety
7 from known or adverse effects of air pollutants. Generally,
8 the secondary standards are equal to or lower than the
9 primary standards.

10 Q. Are the ambient air quality standards designed to
11 protect everyone?

12 A. Yes, they are, they're designed to protect the very
13 young, children, the elderly, as well as the sick, including
14 those with respiratory problems, such as asthmatics.

15 Q. All right, sir, how are ambient air quality
16 standards set?

17 A. EPA has to go through a rule-making process where
18 they have to evaluate air quality standards every five years,
19 and this consists of committees that are made up of
20 scientists as well as physicians and doctors who review the
21 latest findings on any scientific research that's been done
22 to determine whether the current standards are adequate or
23 revisions need to be made.

24 Q. Does Florida have ambient air quality standards?

25 A. Yes, they do. Florida has adopted standards, the

1 attainment for the pollutant ozone.

2 Q. So this area is in attainment, which means the air
3 quality here is better than the maximum limits allowed under
4 the ambient air quality standards?

5 A. That's correct.

6 Q. What is PSD increments?

7 A. PSD increments are limits that establish the
8 incremental air quality in an area. The amount of PSD is
9 based on the character or the air is classified according to
10 allowances for increases in air pollutants.

11 Q. Well, how is Brevard County classified under the
12 PSD program?

13 A. Brevard County is classified as a PSD Class Two
14 increment, which allows for moderate increases in air
15 pollution.

16 Q. All right. Did you perform an air quality impact
17 analysis to determine whether the proposed Oleander Power
18 Project would comply with the limits established by the
19 ambient air quality standards and the PSD increments?

20 A. Yes, I did.

21 Q. All right, and what was -- excuse me. Did your
22 analysis comply with the DEP and EPA requirements for such
23 assessments?

24 A. Yes, they did comply with them.

25 Q. Would you describe for us what you did as part of

1 your analysis.

2 A. As part of the analysis, we used methods and
3 methodology recommended for and developed by the U.S. EPA as
4 well as DEP in assessing the air quality assessments for the
5 project. These assessments followed U.S. EPA documentation
6 and air modeling guidelines in terms of models, and using
7 receptors we conformed with what was recommended.

8 Q. You used a standard EPA model?

9 A. Yes, we predicted concentrations with the
10 Industrial Source Complex Short Term Dispersion Model,
11 referred to as ISCSTD 3 model, and that's a model typically
12 used in areas that have gently rolling to flat terrain. It's
13 applicable to point sources or stack emissions such as for
14 the project.

15 And it's specifically recommended for uses by both
16 DEP and EPA for assessments such as the Oleander Power
17 Project.

18 Q. As part of your modeling, did you use any
19 meteorological data?

20 A. We used five years of hourly meteorological data
21 from the Orlando International Airport. And that consisted
22 of meteorological parameters such as wind direction, wind
23 speed, temperature and other parameters that are needed to
24 do the air quality assessment.

25 This particular weather data is recommended

1 specifically by DEP to address the air quality impacts in
2 this county.

3 Q. And did your analysis consider potential impacts in
4 the area surrounding the project?

5 A. Yes, we did. We modeled consistent with the
6 guidelines, what we refer to as receptor locations where we
7 actually located points around the facility. We had more
8 than approximately 500 or more locations out to more than
9 five miles away from the facility.

10 With that, we also used as part of the modeling
11 exercise, which refers to the regulatory default options,
12 which are a series of technical features that must be used in
13 an application such as this particularly for air permitting
14 purposes.

15 Q. Well, does the model account for meteorological
16 events such as inversion?

17 A. Yes, it does. As I mentioned earlier, we used five
18 years of our meteorological data and that includes an --
19 inversion is the occurrence such as a low mix height, or a
20 very small volume of air in which pollutants can be dispersed
21 or trapped and use high concentrations.

22 Since we considered five years, we had more than
23 40,000 weather observations which did include inversions, or
24 low mix heights, to be included in the analysis.

25 Q. Well, based on your analysis in this case, have you

1 formed an opinion as to whether the Oleander Power Project
2 will comply with all of the applicable ambient air quality
3 standards and PSD increments?

4 A. Yes, I've concluded that the Oleander Power Project
5 will comply with all the ambient air quality standards and
6 PSD increments.

7 Q. I'd like you to take Exhibit 20 and explain for us
8 very briefly how you reached your conclusion.

9 A. Exhibit 20 is a summary of the maximum pollutant
10 concentrations predicted for the project. And it shows a
11 series of pollutants in the first column from SO₂, sulfur
12 dioxide, NO₂, nitrogen dioxide, particulate model, PM₁₀, as
13 well as carbon monoxide.

14 And since there are various averaging times for
15 the standards, there are also averaging times for the
16 concentrations. For example, for SO₂ we predicted
17 concentrations for both natural gas and oil-fired that
18 consider in the combustion turbines and then compared them to
19 the ambient air quality standards. What it shows is the
20 concentrations predicted for the power plant are well below
21 the standards.

22 Higher impacts are occurring for the oil-firing
23 case.

24 Q. What are EPA significant impact levels?

25 A. The EPA significant impact levels are threshold

1 Q. -- so small that you can't represent them with a
2 box, it's basically a flat line?

3 A. That's correct.

4 Q. All right, sir.

5 A. That's correct. The second exhibit, Exhibit 23,
6 this compares the air quality impacts from the project to the
7 ambient air quality standards and PSD increments. What this
8 indicates is that for sulfur dioxide concentrations, the
9 project's impact is less than .6% of the ambient air quality
10 standards and less than two percent of the PSD increment.

11 The next set of Exhibits, Exhibits 24 and 25, show
12 the similar comparison of particulate matter to ambient
13 predictions for the project. And again, the information is
14 presented for the project in comparison to the ambient air
15 quality standard and PSD Class Two increment. There's a very
16 thin bar compared to the ambient air standards or Class Two
17 increments.

18 Exhibit 25 shows the percent of the standards. And
19 for particulate matter they were less than .2 percent of the
20 ambient air quality standards and about 1.1 percent, or less
21 than the PSD Class Two increments.

22 Q. And are 26 and 27 similar?

23 A. Yes, they are.

24 Q. They present information for nitrogen dioxide and
25 for --

1 I N D E X

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3 PUBLIC COMMENT:

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MARJORIE DERRICK 29

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JAN MOODY 30

CRAIG BOCK 34

6

DOUGLAS SPAHR 54

TOM BERRINGER 59

7

OLEANDER'S WITNESSES: DIRECT CROSS REDIRECT RECROSS

8

RICHARD Zwolak 89 136 153

9

KENNARD F. KOSKY 155 177

10

ROBERT McCANN 184 218

11

AL LINERO 226 238

12

DEP'S WITNESSES:

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NONE

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15

PETITIONER'S WITNESSES:

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JUANITA BARTON 269 272

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E X H I B I T S

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OLEANDER'S EXHIBITS:ID EVIDENCE

7, 8, 12, 16, 17, 31, 34, 35, 36, 45, 46 132

14, 28, 29, 30, 1, 6, 9, 10, 13 176

15, 20-27, 37-44 217

2, 3, 4, 5, 11, 19, 32 237

DEP'S EXHIIBTS:

NONE

PETITIONER'S EXHIBITS:

1 180

3 252

7 261

P R O C E E D I N G S (Continued)

1
2 Q. What did you do?

3 A. We looked at the major sources of air pollutants in
4 the, in the area and they included the Florida Power and
5 Light Canaveral Plant, Orlando Utilities Commission Indian
6 River Plant, as well as the Orlando Utilities Commission
7 Stanton Energy Center, then developed through the modeling
8 that we had performed. On the project we used the ISCST
9 model and the five years of meteorological data.

10 Q. All right. I'd like you to use Exhibit 21 to
11 summarize your conclusions regarding the cumulative impacts
12 that would be associated with the operation of Oleander and
13 these other power plants that you've identified.

14 A. Exhibit One presents a summary of the --

15 Q. Exhibit 21, sir.

16 A. I'm sorry, I thought you said Exhibit One.

17 Q. Thank you.

18 A. Exhibit 21 is a Summary of Maximum Pollutant
19 Concentrations Predicted for the Proposed Oleander Power
20 Project With Other Air Emission Sources. And it's presented
21 with pollutants of sulfur dioxide, nitrogen oxide and
22 particulate matter.

23 In general, what it shows is that the maximum
24 concentration predicted when all these sources are considered
25 in the same model are generally 50 percent or lower than the

1 specifically for this region, generally speaking, the two
2 monitors measure ozone concentrations very similarly in terms
3 of trends as well as magnitudes.

4 Based on the DEP workshop that was held in May of
5 this year, DEP presented information regarding the regional
6 nature of ozones specifically for Brevard County, as well,
7 and showed that for the two monitors in Brevard County, when
8 the concentrations went up at one monitor they also went up
9 at the other. If they went down at one, they went down at
10 the other. The magnitudes were very same, very similar.

11 In reviewing the data for the other monitors in
12 adjoining counties, the same trends and magnitudes held.

13 Q. Well, how do the ozone measurements here in Brevard
14 County compare to the applicable ambient air quality
15 standards for ozone?

16 A. They meet the standards, they comply; therefore,
17 the area is in attainment.

18 Q. Well, given your review of the issues in this case,
19 have you determined whether an additional ozone monitor is
20 needed here in Brevard County?

21 A. Although an additional monitor can provide an
22 additional measurement point, in terms of added value it will
23 not determine or help in assisting in determining whether the
24 air is complying or not complying.

25 Q. And I take it it would not help in determining

1 region and we collected data in the '82 to '83 time period by
2 the Florida Electric Coordinating group FCG which had
3 measured wet deposition in Melbourne. The value determined
4 there for over a one-year period was about .2 grams per meter
5 squared.

6 In evaluating deposition, you're looking at not
7 only the wet component as well as the dry component. And
8 typically, from literature the dry component is about equal
9 to the wet component. So we doubled the results for the wet
10 deposition measurement value and came up with .4 grams per
11 meter squared.

12 If you take a look at the .0007 divided by the .4
13 gram measured, it's less than .5 percent change in impacts.

14 Q. So the Oleander -- the NO_x emissions from the
15 Oleander Power Project would contribute 0.5 percent of the
16 NO_x deposition that is -- or nitrogen deposition that is
17 currently occurring in this area?

18 A. Well, again, we took the measurements from 1982 to
19 1983. In reviewing that data, there was some variability
20 across the state. Because emission may have increased since
21 that time period, if anything, the existing nitrogen
22 deposition may be higher, therefore, our contribution to the
23 total would be lower.

24 Q. You've mentioned this deposition rate. Over what
25 period of time are you talking about?

1 A. The measured deposition.

2 Q. Well, you've talked about the calculated deposition
3 rate that would occur as a result of this project.

4 A. What we looked at was, again, we used five years
5 and we selected the point of maximum depositions. So it's a
6 one-year average selected over five years.

7 We also -- in evaluating that point, typically
8 there would be other areas which would be less than the
9 maximum point, generally 50 percent or lower for most of the
10 adjoining areas, including some of the adjacent water bodies.

11 Q. I just want to make sure I understand. This -- the
12 amount of nitrogen that's to be deposited, that would occur
13 over a period of one year?

14 A. That's correct.

15 Q. Okay.

16 A. That's correct.

17 Q. And you started to explain why your analysis was
18 conservative. You said that most of the areas will not
19 receive the maximum rate of deposition?

20 A. That's correct.

21 Q. All right, and were your other assumptions in the
22 analysis conservative in this designed to overestimate
23 impacts?

24 A. Yes, they were, sir.

25 Q. Given your analysis, have you formed an opinion as

1 case and your experience and your projections, have you
2 formed an opinion as to whether the Oleander Power Project
3 will comply with all of the applicable DEP statutes, rules
4 and policies concerning the project's air emissions?

5 A. Based on my review and evaluations done, my
6 conclusion is that the project will comply with all
7 applicable air quality standards and guidelines and
8 references by DEP as well as EPA.

9 Q. Will the project be able to comply with all of the
10 permit conditions contained in Exhibit 11, which is the draft
11 DEP permit for this project?

12 A. Yes, it will.

13 Q. All right have you formed an opinion as to whether
14 the Department should issue a PSD permit for this project?

15 A. Yes, I have. I believe the Department should issue
16 the permit.

17 Q. All right, sir. Now, did you prepare any of the
18 sections in Exhibit One?

19 A. Yes, I prepared Section Three which is the Air
20 Quality Review and Applicability, Section Five, Ambient Air
21 Quality Analysis, Section Six, the Ambient Impact Analysis,
22 and Section Seven, the Additional Impact Analysis.

23 Q. All right, sir, did you also prepare or assist with
24 the preparation of Exhibits 6, 9, 10 and 13, which are the
25 letters from Golder to DEP concerning the project?

1 MR. DEE: Yes, sir.

2 JUDGE: Okay, Department has no
3 objection.

4 MR. ROWE: No objection.

5 JUDGE: Mr. -- all right. Exhibits --
6 I have 10 and 13 already in evidence.

7 MR. DEE: They are, sir, but I'm just
8 trying to -- this gentleman helped with
9 the prepping of those documents with
10 issues that are within his area of
11 expertise. I'm just trying to establish
12 the predicate for the introduction of
13 those documents.

14 JUDGE: Sure.

15 MR. DEE: And that's also true with some
16 of the other Exhibits I just mentioned.

17 JUDGE: Oleander Exhibits 15 and 20
18 through 27 and 37 through 44 as previously
19 identified in the record are admitted in
20 evidence without objection. Give me just
21 a few minutes to catch up to you.

22 MR. DEE: All right, thank you.

23 (Whereupon, Oleander's Exhibits 15, 20-27 and
24 37-44 were marked and received in evidence.)

25 JUDGE: Okay, Mr. Dee.

1 located site and at the same time near I -- not I-95 -- yeah,
2 I-95 where you got carbon monoxide running up and down the
3 road all day and these things are 11, 12, 20 something miles
4 away, how does it pick up that kind of information so far
5 away rather than being there and not only that you're going
6 to build a plant that's going to be in a Title V and you have
7 citizens that are concerned about the health and welfare and
8 your monitors are so far away?

9 A. Well, first off, ozone is a regional pollutant.
10 And it's -- for instance, for this project, ozone is not
11 emitted directly into the atmosphere. There are precursors
12 or there are compounds that are emitted that then form ozone.

13 Based on volatile organic compound emissions as
14 well as nitrogen oxide, they combine in the presence of
15 sunlight to then form ozone.

16 This process generally takes time to occur and,
17 therefore, distance. As a result, even EPA monitoring
18 criteria -- and that's one of the reasons why there are two
19 monitors in Brevard County, which is only one of 23 counties
20 in the state that has an ozone monitor and it's only one of
21 14 counties that has two, because of the regional nature,
22 generally ozone monitors are separated by great distances.

23 And I would expect any monitor to be located at the
24 Oleander site not to really pick up any concentrations of
25 ozone due to the project. Simply because there would be not

1 many people attended the meeting on May 13, 1999?

2 A. On the -- what date?

3 Q. The second meeting on May 13.

4 A. I think about 20. I think about 20 were there and
5 about 10 stayed for most of the meeting.

6 Q. Did you -- did the Department receive written or
7 verbal comments about this project from the public either
8 during or after the public meetings?

9 A. Yes, we did, we received quite a number of comments
10 even before the first public meeting. Some of those comments
11 were in the form of letters, numerous phone calls and quite a
12 number of electronic mail submittals.

13 Q. Did the Department consider those comments before
14 the Department formulated its decision in this case
15 concerning the permit application?

16 A. Yes, we did consider those comments and those
17 comments were discussed with, with Oleander and, certainly,
18 those comments had quite a bit to do with Oleander reducing
19 its fuel oil hours from 2,000 to 1,000.

20 Q. And based on your experience in general and your
21 work on this project, have you formed a professional opinion
22 as to whether the emission limits and control technologies
23 proposed by Oleander in this case represent the best
24 available control technology for the Oleander Power Project?

25 A. Yes, for this type of project, the limits on gas

1 are the lowest that I've heard of in the country for what's
2 called an attainment area operating as a simple cycle
3 project. For oil, they're equal to the best available
4 control technology.

5 Q. Have you formed a professional opinion as to
6 whether the Oleander Power Project will cause or contribute
7 to violations of any state or federal ambient air quality
8 standards?

9 A. Yes, I have.

10 Q. And what is your opinion, sir?

11 A. That the Oleander Project will not cause or
12 contribute to any violation of a national ambient air quality
13 standard or allowable increment.

14 Q. So it will not cause or contribute to a violation
15 of any applicable PSD increment?

16 A. Yes, sir, that's correct.

17 Q. Have you formed a professional opinion whether the
18 Oleander Power Project complies with all the DEP applicable
19 statutes, rules, policy and guidance concerning air quality
20 issues?

21 A. Yes, I have.

22 Q. And what is your opinion?

23 A. That it does comply with all applicable rules and
24 regulations.

25 Q. When DEP reviews a PSD permit application, does DEP

1 evaluate environmental justice issues?

2 A. No.

3 Q. I'd like you to take a look at Exhibit 32, which is
4 a letter from DEP to Mr. Rowe.

5 A. Yes, sir.

6 Q. All right, does that Exhibit accurately reflect the
7 Department's position with regard to environmental justice
8 issues in PSD permitting cases?

9 A. Yes, it does. It was prepared by our office
10 general counsel and it is my understanding it is the
11 Department's position on the matter and rules.

12 Q. All right, sir. When DEP reviews the permit
13 application, does DEP review the impact of the project's
14 airborne emissions on water quality?

15 A. No.

16 Q. Does the Department have any rules or other
17 criteria to use for evaluating environmental justice issues
18 or the water quality impacts associated with airborne
19 emissions?

20 A. There are no rules at all for environmental
21 justice. You can look at impacts on water quality from the
22 standpoint of the impacts of the control equipment that is
23 applied to minimize the air emissions. If that control
24 equipment itself has an impact on water quality or solid
25 waste, then you can take that into consideration. But not

1 Q. Has the Department received reasonable assurance
2 that Oleander will be able to comply with all the emission
3 limits and permit conditions contained in Exhibit 11?

4 A. Yes.

5 MR. DEE: Your Honor, at this time
6 I'd like to move the following Exhibits
7 into evidence.

8 JUDGE: Go ahead.

9 MR. DEE: Exhibits 2, 3, 4, 5 7, 8,
10 11, 19 and 32.

11 JUDGE: Mr. Goorland?

12 MR. GOORLAND: No objection.

13 JUDGE: Mr. Rowe?

14 MR. ROWE: No objection.

15 JUDGE: Oleander's Exhibits 2, 3, 4, 5 7,
16 8, 11, 19 and 32 are admitted in evidence
17 without objection. I already have 7 and 8
18 in.

19 MR. DEE: Wonderful.

20 JUDGE: So they're in.

21 (Whereupon, Oleander's Exhibits 2, 3, 4, 5, 11,
22 19 and 32 were marked and received in evidence.)

23 JUDGE: Go ahead, Mr. Dee.

24 MR. DEE: I have no further questions
25 for this Witness.

1 the 13th. The meeting that was advertised
2 April 8th was a meeting that was held prior
3 to.

4 JUDGE: Okay, it's relevant and
5 material, why is it relevant and
6 material, to what standard and
7 requirement?

8 MR. ROWE: I think it shows a concern
9 on the part of the citizens that they were
10 not aware of the meeting and that the
11 Chairman of the Board as well as other
12 citizens did write correspondence to that
13 effect.

14 JUDGE: Anything further, Mr. Dee?

15 MR. DEE: This line of questioning
16 is not relevant to whether the Applicant
17 has complied with the applicable
18 standards so it's irrelevant and --

19 JUDGE: The objection is sustained.
20 Ask your next question.

21 MR. ROWE: I have no further questions.
22 Your Honor, if it's possible, these are
23 some of my exhibits --

24 JUDGE: Do it in your case in chief.

25 MR. ROWE: Sir?

1 MR. ROWE: Yes, sir.

2 JUDGE: Responses to Request to Produce?

3 MR. ROWE: Yes, sir, I think so.

4 JUDGE: So Petitioner's Three is an exhibit
5 consisting of Petitioner's Answers to
6 Interrogatories, Petitioner's Responses to
7 Request for Admissions and Petitioner's
8 Responses to Request to Produce.

9 Mr. Dee, have you had an opportunity
10 to review Petitioner's Three?

11 MR. DEE: I'm not sure that we've got
12 an accurate description of Three. I
13 thought when Mr. Rowe started to talk about
14 his deposition --

15 MR. ROWE: Well, this is --

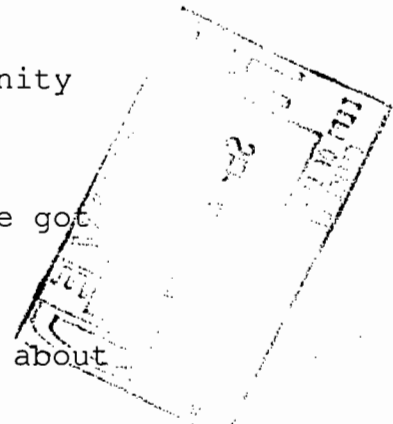
16 MR. DEE: -- and the exhibits that were
17 attached to your deposition --

18 MR. ROWE: That's what I thought I did.

19 MR. DEE: Well, there are no Answers to
20 Interrogatories or Requests to Produce
21 attached to it. I have no objection to Mr.
22 Rowe's deposition going into the record, if
23 that's what he's trying to introduce.

24 MR. ROWE: Uh-huh.

25 MR. DEE: So attached, Your Honor.



STATE OF FLORIDA

DIVISION OF ADMINISTRATIVE HEARINGS

COPY

1 CLARENCE ROWE,)
 2)
 3)
 4 Petitioner,)
 5)
 6 vs.)
 7)
 8 OLEANDER Power Project, L.P.,)
 and Department OF ENVIRONMENTAL)
 PROTECTION,)
 9)
 10 Respondent.)
 _____)

CASE NO.: 99-2581

* * * * *

TRANSCRIPT OF PROCEEDINGS
VOLUME II

* * * * *

13 The above and foregoing cause having come to be heard
 14 before DANIEL MANRY, Administrative Law Judge, on August 30,
 15 1999, at the hour of 9:30 a.m., at the Brevard County
 16 Government Center, Building B, 2725 Fran Jamieson Way, in
 17 the City of Viera, County of Brevard, State of Florida, for
 18 the purpose of taking testimony in said cause.

REPORTED BY:

DEBRA M. ARTER
Registered Diplomate Reporter

23 ASSOCIATED COURT REPORTERS
 24 105 South Narcissus Avenue - Suite 608
 West Palm Beach, Florida 33041
 25 (561) 655-2300

A P P E A R A N C E S

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FOR THE PETITIONER:

CLARENCE ROWE
(Pro se)

FOR THE RESPONDENT OLEANDER:

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Landers & Parsons, P.A.
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FOR THE RESPONDENT DEP:

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Assistant General Counsel
3900 Commonwealth Boulevard, MS-35
Tallahassee, Florida 32399-3000

* * * * *

1 I N D E X

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3 PUBLIC COMMENT:

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MARJORIE DERRICK 29

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JAN MOODY 30

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CRAIG BOCK 34

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DOUGLAS SPAHR 54

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TOM BERRINGER 59

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10 OLEANDER'S WITNESSES: DIRECT CROSS REDIRECT RECROSS

11

RICHARD Zwolak 89 136 153

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KENNARD F. KOSKY 155 177

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RICHARD McCANN 184 218

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AL LINERO 226 238

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DEP'S WITNESSES:

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NONE

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18 PETITIONER'S WITNESSES:

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JUANITA BARTON 269 272

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E X H I B I T S

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OLEANDER'S EXHIBITS:ID EVIDENCE

7, 8, 12, 16, 17, 31, 34, 35, 36, 45, 46

132

14, 28, 29, 30, 1, 6, 9, 10, 13

176

15, 20-27, 37-44

217

2, 3, 5, 11, 19, 32

237

DEP'S EXHIBITS:

NONE

PETITIONER'S EXHIBITS:

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A P P E A R A N C E S

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FOR THE PETITIONER:

CLARENCE ROWE
(Pro se)

FOR THE RESPONDENT OLEANDER:

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* * * * *

1 I N D E X

2

3 PUBLIC COMMENT:

4

MARJORIE DERRICK 29

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JAN MOODY 30

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CRAIG BOCK 34

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DOUGLAS SPAHR 54

8

TOM BERRINGER 59

9

OLEANDER'S WITNESSES: DIRECT CROSS REDIRECT RECROSS

10

RICHARD Zwolak 89 136 153

11

KENNARD F. KOSKY 155 177

12

RICHARD McCANN 184 218

13

AL LINERO 226 238

14

DEP'S WITNESSES:

15

NONE

16

17

PETITIONER'S WITNESSES:

18

JUANITA BARTON 269 272

19

20

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E X H I B I T S

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OLEANDER'S EXHIBITS:ID EVIDENCE

7, 8, 12, 16, 17, 31, 34, 35, 36, 45, 46

132

14, 28, 29, 30, 1, 6, 9, 10, 13

176

15, 20-27, 37-44

217

2, 3, 5, 11, 19, 32

237

DEP'S EXHIBITS:

NONE

PETITIONER'S EXHIBITS:

1

180

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261

P R O C E E D I N G S (Continued)

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Q. What did you do?

A. We looked at the major sources of air pollutants in the, in the area and they included the Florida Power and Light Canaveral Plant, Orlando Utilities Commission Indian River Plant, as well as the Orlando Utilities Commission Standard Energy Center, then developed through the modeling that we had performed. On the project we used the ISCST model and the five years of meteorological data.

Q. All right. I'd like you to use Exhibit 21 to summarize your conclusions regarding the cumulative impacts that would be associated with the operation of Oleander and these other power plants that you've identified.

A. Exhibit One presents a summary of the --

Q. Exhibit 21, sir.

A. I'm sorry, I thought you said Exhibit One.

Q. Thank you.

A. Exhibit 21 is a Summary of Maximum Pollutant Concentrations Predicted for the Proposed Oleander Power Project With Other Air Emission Sources. And it's presented with pollutants of sulfur, nitrogen oxide and particulate matter.

In general, what it shows is that the maximum concentration predicted when all these sources are considered in the same model are generally 50 percent or lower than the

1 Florida ambient air quality standard.

2 These impacts, I might point out when we evaluated
3 the source contributions from the sources, they were
4 generally from the background sources that were dominating
5 impacts. The project itself either had no impact or no
6 measurable impact, if you will, for the levels predicted
7 here.

8 Q. Why did you select those three pollutants for your
9 analysis?

10 A. Those were the primary pollutants of concern that
11 could be attributable to stack emissions.

12 Q. All right, sir, did you consider whether Oleander
13 should install ambient air quality monitors in Brevard County
14 to measure the effects associated with the operation of this
15 project?

16 A. Yes, we did. Since the project's impacts were less
17 than the significant impact levels, they would also be less
18 than the detectable limits for monitoring equipment as well
19 as pre-construction monitoring requirement that has been
20 established by U.S. EPA and DEP. So we're less than the
21 required monitoring pre-construction levels.

22 Q. Just let me make sure I understand that you're not
23 obligated -- or excuse me, Oleander is not obligated to
24 install pre-construction monitors under any applicable state
25 or federal standard?

1 A. That's correct.

2 Q. All right. Did I also understand you to say that
3 if monitors were installed, the impacts of this project could
4 not be measured?

5 A. That's correct, because they're less than the
6 significant impact levels.

7 Q. All right sir. Do you know whether the Florida
8 Department of Environmental Protection already has monitors
9 in place in Brevard County?

10 A. Yes, I do, they have two ozone monitors in Brevard
11 County and two particulate matter monitors, I believe.

12 Q. All right, does it have other monitors in this
13 region?

14 A. Yes, to the north in Volusia County there are two
15 ozone monitors. Seminole County, Orange County and Osceola
16 also have additional monitors. And then to the south, Saint
17 Lucie County, there's an additional ozone monitor. These are
18 all located, except for Saint Lucie, probably about 50 to 60
19 miles of the site.

20 Q. Well, how do the ozone measurements here in the
21 county compare with measurements made elsewhere in the
22 region?

23 A. Based on the review that I've performed, on the
24 monitoring data that I prepared from the DEP over the last
25 five years as well as analyses that DEP has performed

1 specifically for this region, generally speaking, the two
2 monitors measure ozone concentrations very similarly in terms
3 of trends as well as magnitudes.

4 Based on the DEP workshop that was held in May of
5 this year, DEP presented information regarding the regional
6 nature of ozones specifically for Brevard County, as well,
7 and showed that for the two monitors in Brevard County, when
8 the concentrations went up at one monitor they also went up
9 at the other. If they went down at one, they went down at
10 the other. The magnitudes were very same, very similar.

11 In reviewing the data for the other monitors in
12 adjoining counties, the same trends and magnitudes held.

13 Q. Well, how do the ozone measurements here in Brevard
14 County compare to the applicable ambient air quality
15 standards for ozone?

16 A. They meet the standards, they comply; therefore,
17 the air is in attainment.

18 Q. Well, given your review of the issues in this case,
19 have you determined whether an additional ozone monitor is
20 needed here in Brevard County?

21 A. Although an additional monitor can provide an
22 additional measurement point, in terms of added value it will
23 not determine or help in assistance in determining whether
24 the air is complying or not complying.

25 Q. And I take it it would not help in determining

1 whether the project has any impact because the impacts
2 couldn't be measured.

3 A. That's correct.

4 Q. What would it cost to install an ozone monitor and
5 collect data for an appropriate period of time?

6 A. Based on discussions that I've had with people
7 within my organization, as well as DEP, the price can range
8 from 75,000 to \$100,000 per year.

9 Q. And approximately how long would you want to
10 collect data in order to have a meaningful data base?

11 A. Well, you definitely would want to collect it for
12 one year and continue it for trends.

13 Q. Did you evaluate the impacts of the Oleander
14 Project on, that is to say, the impacts of the air emissions
15 from the Oleander Project on soils, vegetation, visibility
16 and growth-related air quality impacts?

17 A. Yes, we looked at the predicted impacts on soils,
18 vegetation, visibility and growth-related air quality impacts
19 and determined that because the impacts were less than the
20 significant values, there would be no significant adverse
21 effect on those parameters.

22 Q. All right, did you try to determine whether the
23 airborne emissions from the Oleander Power Project would
24 cause any adverse effects on water quality in nearby lakes,
25 rivers or streams?

1 A. We looked at, in terms of what the pollutants
2 emissions are from the combustion turbine using fuel oil and
3 natural gas, the particles will be emitted in very small
4 particles, generally less than -- under ten microns, which is
5 a very small diameter.

6 Because of that small size, they tend to stay
7 airborne. As a result, we expect to see minimal, if any,
8 fallout on adjoining bodies of water.

9 Q. Well, did you try to determine whether the impacts
10 of the project's NO_x emissions would include any
11 deterioration of water quality in nearby water bodies?

12 A. We did but we weren't required to.

13 Q. Tell me what you did.

14 A. What we did was we looked at the deposition due to
15 nitrogen oxide emissions from the power plant and looked at
16 that to look at nitrogen oxide fallout. This procedure
17 followed the same methods in determining concentration
18 methods where you again use the ISCST dispersion model, the
19 five years of meteorological data together with assuming that
20 the plant would be firing just fuel oil.

21 Based on that analysis, we came up with a
22 deposition calculation that's in terms of a weight per unit
23 area. The value we came up with was 0.0007 grams per meter
24 squared, which is typical wet deposition.

25 We also put that in terms of the monitor for that

1 region and we collected data in the '82 to '83 time period by
2 the Florida Electric Coordinating group FCJ which had
3 measured wet deposition in Melbourne. The value determined
4 there for over a one-year period was about .2 grams per meter
5 squared.

6 In evaluating deposition, you're looking at not
7 only the wet component as well as the dry component. And
8 typically, from literature the dry component is about equal
9 to the wet component. So we doubled the results for the wet
10 deposition measurement value and came up with .4 grams per
11 meter squared.

12 If you take a look at the .0007 divided by the .4
13 gram measured, it's less than 25 percent change in impacts.

14 Q. So the Oleander -- the NO_x emissions from the
15 Oleander Power Project would contribute 0.5 percent of the
16 NO_x deposition that is -- or nitrogen deposition that is
17 currently occurring in this area?

18 A. Well, again, we took the measurements from 1982 to
19 1983. In reviewing that data, there was some variability
20 across the state. Because emission may have increased since
21 that time period, if anything, the existing nitrogen
22 deposition may be higher, therefore, our contribution to the
23 total would be lower.

24 Q. You've mentioned this deposition rate. Over what
25 period of time are you talking about?

1 A. The measured deposition.

2 Q. Well, you've talked about the calculated deposition
3 rate that would occur as a result of this project.

4 A. What we looked at was, again, we used five years
5 and we selected the point of maximum depositions. So it's a
6 one-year average selected over five years.

7 We also -- in evaluating that point, typically
8 there would be other areas which would be less than the
9 maximum point, generally 50 percent or lower for most of the
10 adjoining areas, including some of the adjacent water bodies.

11 Q. I just want to make sure I understand. This -- the
12 amount of nitrogen that's to be deposited, that would occur
13 over a period of one year?

14 A. That's correct.

15 Q. Okay.

16 A. That's correct.

17 Q. And you started to explain why your analysis was
18 conservative. You said that most of the areas will not
19 receive the maximum rate of deposition?

20 A. That's correct.

21 Q. All right, and were your other assumptions in the
22 analysis conservative in this design to overcome to estimated
23 impacts?

24 A. Yes, they were, sir.

25 Q. Given your analysis, have you formed an opinion as

1 to whether the airborne emissions from the project would
2 cause any measurable impacts to water quality on any of the
3 water bodies here in Brevard County?

4 A. Based on the relatively low impacts, the conclusion
5 I come to is that we will not have any significantly adverse
6 effect on the water bodies.

7 Q. Now, do you know whether DEP or EPA require an
8 applicant for a PSD permit to perform an analysis of a
9 project's impacts on water quality?

10 A. No, not that I'm aware of.

11 Q. They do not require it.

12 A. They do not require it.

13 Q. Do you know whether DEP has any rules or criteria
14 to use when evaluating such analyses?

15 A. There are no EPA or DEP criteria.

16 Q. Do you know whether EPA or DEP has ever denied a
17 PSD permit because of its impacts on water quality?

18 A. No, I'm not aware of any.

19 Q. All right, sir. Now I'd like you to take a look at
20 Exhibit 37 through 44. What do those Exhibits depict?

21 A. These Exhibits are figures that show the
22 distribution, the spatial distribution of maximum impacts,
23 ground level impacts due to the project within approximately
24 a two-mile radius from the site. They're evaluating the
25 spatial distribution of sulfur dioxide concentrations, looks

1 like, in Exhibits 36, 37, 38 and 39. Exhibit 40 and 41
2 assesses the carbon monoxide impact due to the power plant.

3 Exhibit 42 presents information for the nitrogen
4 dioxide concentrations predicted for the power plant.

5 Then 43 and 44 show the spatial distribution of
6 particulate matter due to the, predicted concentrations of
7 particulate matter due to the project.

8 Q. So those Exhibits show us where the maximum impacts
9 will occur.

10 A. That's correct.

11 Q. And the other Exhibits that you've discussed told
12 us what the maximum impacts would be?

13 A. That's correct.

14 Q. All right, sir. Based on your analysis, have you
15 been able to determine whether the airborne emissions from
16 this project would have any meaningful adverse impacts on any
17 neighborhood or community here in Brevard County?

18 A. Again, similar to. Based on my results that show
19 that the project's impact are less than significant impact
20 values, there should be no meaningful impacts to the projects
21 in the neighborhood surrounding the project.

22 Q. And that's with regard to any neighborhood or any
23 community.

24 A. That's correct.

25 Q. All right, sir. Based on your analysis in this

1 case and your experience and your projections, have you
2 formed an opinion as to whether the Oleander Power Project
3 will comply with all of the applicable DEP statutes, rules
4 and policies concerning the project's air emissions?

5 A. Based on my review and evaluations done, my
6 conclusion is that the project will comply with all
7 applicable air quality standards and guidelines in reference,
8 by DEP as well as EPA.

9 Q. Will the project be able to comply with all of the
10 permit conditions contained in Exhibit 11, which is the draft
11 DEP permit for this project?

12 A. Yes, it will.

13 Q. All right have you formed an opinion as to whether
14 the Department should issue a PSD permit for this project?

15 A. Yes, I have. I believe the Department should issue
16 the permit.

17 Q. All right, sir. Now, did you prepare any of the
18 documents in Section One?

19 A. Yes, I prepared Section Three which is the Air
20 Quality Review and Applicability, Section Five, Ambient Air
21 Quality Analysis, Section Six, the Ambient Impact Analysis,
22 and Section Seven, the Additional Impact Analysis.

23 Q. All right, sir, did you also prepare or assist with
24 the preparation of Exhibits 6, 9, 10 and 13, which are the
25 letters from Golder to DEP concerning the project?

1 A. Yes, I did.

2 Q. All right, during your testimony today you used
3 Exhibits 20 through 27 and 37 through 44. Did you also
4 prepare those Exhibits?

5 A. Yes, I did.

6 Q. To the best of your knowledge, is the information
7 contained in all of these Exhibits that I've just identified
8 true and correct?

9 A. Yes, they are.

10 Q. And do you adopt the statements and the information
11 contained in those Exhibits as part of your testimony here
12 today?

13 A. Yes, I do.

14 MR. DEE: Your Honor, at this time
15 Oleander moves the following Exhibits
16 into evidence --

17 JUDGE: That will be Exhibit One
18 which you've already admitted but now
19 confirmed the, or set the predicate for.
20 The remainder of the production of that
21 Exhibit, 6, of course, the same is true,
22 9, also true 10, 13, 15, 20 through 27
23 and 37 through 44.

24 MR. GOORLAND: No objection.

25 JUDGE: 37 through 44?

1 MR. DEE: Yes, sir.

2 JUDGE: Okay, Department has no
3 objection.

4 MR. ROWE: No objection.

5 JUDGE: Mr. -- all right. Exhibits --
6 I have 10 and 13 already in evidence.

7 MR. DEE: They are, sir, but I'm just
8 trying to -- this gentleman helped with
9 the prepping of those documents with
10 issues that are within his area of
11 expertise. I'm just trying to establish
12 the predicate for the introduction of
13 those documents.

14 JUDGE: Sure. And that's also true
15 with some of the other Exhibits I just
16 mentioned.

17 JUDGE: Oleander Exhibits 15 and 20
18 through 27 and 37 through 44 as previously
19 identified in the record are admitted in
20 evidence without objection. Give me just
21 a few minutes to catch up to you.

22 MR. DEE: All right, thank you.

23 (Whereupon, Oleander's Exhibits 15, 20-27 and
24 37-44 were marked and received in evidence.)

25 JUDGE: Okay, Mr. Dee.

1 MR. DEE: If I could just confirm that
2 1, 6, 9, 10 and 13 are also in evidence.

3 JUDGE: One is in evidence.

4 MR. DEE: Six?

5 JUDGE: Six is in evidence, 9 is in
6 evidence and 10 is in evidence and 13 is
7 in evidence.

8 MR. DEE: Very good, thank you, sir.
9 I have no further questions of this Witness.

10 JUDGE: Further direct?

11 MR. GOORLAND: No, sir.

12 JUDGE: Cross?

13 MR. ROWE: Yes.

14

15 CROSS EXAMINATION

16 BY MR. ROWE:

17 Q. You stated that there was a recommendation not to,
18 that no other monitors were needed at the site. And yet,
19 specifically where -- let me go back.

20 Specifically where are the monitors located in
21 Brevard County?

22 A. Those are monitors, one is located in Cocoa Beach,
23 the other one is in Palm Bay. They're roughly 10 and 25
24 miles away.

25 Q. How effective are monitors that far away from the

1 located site and at the same time near I -- not I-95 -- yeah,
2 I-95 where you got carbon monoxide running up and down the
3 road all day and these things are 11, 12, 20 something miles
4 away, how does it pick up that kind of information so far
5 away rather than being there and not only that you're going
6 to build a plant that's going to be in a Title V and you have
7 citizens that are concerned about the health and welfare and
8 your monitors are so far away?

9 A. Well, first off, ozone is a regional pollutant.
10 And it's -- for instance, for this project, ozone is not
11 emitted directly into the atmosphere. There are precursors
12 or there are compounds that are emitted that then form ozone.

13 Based on volatile organic compound emissions as
14 well as nitrogen oxide, they combine in the presence of
15 sunlight to then form ozone.

16 This process generally takes time to cure and,
17 therefore, distance. As a result, even EPA monitoring
18 criteria -- and that's one of the reasons why there are two
19 monitors in Brevard County, which is only one of 23 counties
20 in the state that has an ozone monitor and it's only one of
21 14 counties that has two, because of the regional nature,
22 generally ozone monitors are separated by great distances.

23 And I would expect any monitor to be located at the
24 Oleander site not to really pick up any concentrations of
25 ozone due to the project. Simply because there would be not

1 sufficient time for development of ozone.

2 Q. What I'm trying to understand, I understood you to
3 say that this is a regional thing and that material goes up
4 and the sunlight produces them. I mean, how do you know
5 where to put this monitor to ensure that you're getting
6 whatever -- I mean, instead of being in Palm Bay 25 miles
7 away, why not put it there closer to 95 where you got a
8 million cars running on a daily basis that you pushing out
9 some type of pollutant? And not only that, you're going to
10 put another plant there.

11 A. Well, given the review that I looked at in terms of
12 the monitoring available over the last five years, there's a
13 remarkable similarity in trend for those two monitors within
14 the county terms in terms of how they're being measured
15 already. That's true not only for those two monitors but
16 monitors in neighboring counties.

17 So that suggests to me, very frankly, that the
18 monitors are located in an area that's measuring similar
19 concentrations and that an additional monitor, although you
20 get another data point, as I discussed, I don't think that in
21 terms of determining whether there's a health problem or air
22 quality related problem that would be justified.

23 Q. Based on your expert opinion, are you saying that
24 if you did place a monitor at that particular site, that
25 you -- the reading wouldn't be any different?

1 A. That's -- than the two monitors that are currently
2 in place?

3 Q. Yes.

4 A. That's correct.

5 Q. I'm just belaboring that, I find that extremely
6 hard to digest.

7 Most of the work that appears, based on what I'm
8 hearing, that you have done, that from models and samples and
9 things of that nature in your Exhibits, can an independent
10 person duplicate your results?

11 A. Definitely.

12 Q. Is the formula in there? I mean, I don't have the
13 slightest idea how you duplicate it or what you do to
14 duplicate it.

15 A. The formula's not in the report directly. What we
16 use is what I consider a standard model as well as a standard
17 approach. In fact, we have to use this model, we have to use
18 these approaches as dictated by the U.S. EPA as well as DEP.

19 So, in fact, all the information, all the programs
20 that I used are, in fact, available through the Internet web
21 site that DEP has and they can be downloaded.

22 And then with the input of the stack parameters for
23 this facility, these models with the weather data can be run.
24 And, in fact, other people can duplicate exactly what we
25 produced.

1 Q. I'm going to assume -- no, let me ask the question.
2 Then based on your findings and your monitoring information
3 and Exhibits, would these Exhibits mean the Clean Air Act
4 standard?

5 A. Oh, yes, they would.

6 Q. And how did you do this, you did this by modeling
7 or monitoring?

8 A. We reviewed the monitoring data.

9 Q. You reviewed it but the results is modeling?

10 A. Well, we are not required to monitor for ozone
11 because we're less than 100 tons a year. And because of the
12 reactive nature of the compounds, the precursors, the VOCs
13 and nitrogen oxide, typically ozone is not modeled in a
14 permit application.

15 Since we are fortunate to have two monitors in
16 Brevard County and since ozone is a regional monitor, the
17 allowance was in terms of reviewing this data that the ozone
18 concentrations in Brevard County would be adequately measured
19 by the project if it were measured and by those two monitors
20 themselves.

21 Q. And those two monitors would take into
22 consideration all the other pollutants in the community as
23 far as ozone is concerned.

24 A. As far as ozone is concerned, that's correct.

25 MR. ROWE: I have no further questions.

1 JUDGE: Redirect?

2 MR. DEE: No, sir.

3 JUDGE: Thank you, you're excused from
4 your oath, you're excused --

5 MR. ROWE: Your Honor, I'd like to --

6 JUDGE: -- as a witness.

7 MR. ROWE: -- enter -- this is a map
8 of the location of the monitors and, I
9 guess you might say, the mileage pertaining
10 to those. If there's no objection, I would
11 certainly like to enter those into the
12 record. Yes, I would like to enter that
13 into the record as, just as information
14 pertaining to the location and the mileage
15 pertaining to those monitoring systems
16 and the location, alleged location of
17 Oleander Power Plant.

18 JUDGE: For identification purposes,
19 this is Petitioner's Two.

20 MR. DEE: Your Honor, I would point
21 out this is a hearsay exhibit and it's
22 not corroborated by any other competent
23 evidence.

24 MR. ROWE: I think he --

25 MR. DEE: It can get accepted --

1 JUDGE: Just a minute, Mr. Rowe.

2 MR. DEE: -- it can get -- you can
3 accept it for whatever it's worth. I
4 don't know that you can use it for
5 the purpose of creating a finding of fact.

6 JUDGE: Mr. Goorland?

7 MR. GOORLAND: I would agree.
8 Unfortunately, we're unable to corroborate
9 this.

10 JUDGE: Okay. Did you want to add
11 something, Mr. Rowe?

12 MR. ROWE: Oh, I was going to say it
13 does have the specific locations, the
14 addresses of those locations, and I won't
15 necessarily go on record and say that
16 those are the exact miles of the location,
17 but I would say it's about on or about in
18 that mileage area, on or about 11 -- I
19 think it says 11 miles from Cocoa Beach
20 and maybe 23 miles for the one in Palm
21 Bay.

22 And then it also has an ID number,
23 I think all this can be established if
24 we were serious about what we're doing.

25 JUDGE: Petitioner's Two is rejected

1 pursuant to the objection.

2 Call your next witness, Mr. Dee.

3 MR. DEE: Yes, sir, at this time
4 Oleander would call Mr. Al Linero.

5 MR. ROWE: Your Honor, when you say
6 it's rejected, that means it's not part
7 of the record, is that correct, sir?

8 JUDGE: I'm going to retain it as
9 part of the record of the case that will
10 be -- if the case is appealed, both
11 rejected and accepted exhibits are
12 retained so if there is any appeal, the
13 Appellate Court has a complete record.

14 MR. ROWE: Yes, sir.

15 JUDGE: As far as the evidentiary
16 record I'm going to rely on to decide
17 the case, it's been rejected, it's not
18 part of the evidentiary record.

19 MR. ROWE: That's fine, thank you,
20 sir.

21 JUDGE: Swear the Witness.

22

23

24

25

1 WHEREUPON,

2 AL LINERO,

3 being first duly sworn by the Court Reporter to tell the
4 whole truth as hereinafter certified, was examined and
5 testified under the oath as follows:

6 JUDGE: State your first and last
7 name and spell each name.

8 THE WITNESS: My name is Al Linero.
9 The last name is L I N E R O, the first
10 name is A L.

11 Judge: Thank you. Mr. Dee.

12 DIRECT EXAMINATION

13 BY MR. DEE:

14 Q. Where are you employed, Mr. Linero?

15 A. I'm employed with the Department of Environmental
16 Protection in Tallahassee.

17 Q. What is your job title at DEP?

18 A. I'm administrator of the New Source Review
19 Section.

20 Q. What are your duties and responsibilities at DEP?

21 A. I manage a section that's responsible for reviewing
22 all major projects, all new major construction in the State
23 of Florida. And I'm responsible for overseeing the engineers
24 and meteorologists who perform that work.

25 Q. When you talk about major construction, you're

1 talking about major sources of air pollution?

2 A. Yes, I am.

3 Q. All right, and how long have you held your position
4 at DEP?

5 A. I've held it for four and a half years.

6 Q. Before you started working at DEP, had you had any
7 prior experience working with air pollution issues?

8 A. Yes, I have approximately 25 years of experience.
9 Before I came to DEP, I worked a small -- short period of
10 time as a consultant for a company called CH2M Hill. And
11 prior to that, I worked for four years as Director of Air
12 Quality in the Broward County Department of Natural Resource
13 Protection.

14 Throughout the entire decade of the '80s, I worked
15 for Arabian American Oil Company, I was in charge of their
16 Technical Environmental Program.

17 And from 1973 through 1978, I worked for
18 Environmental Science and Engineering, a consulting company
19 in the State of Florida.

20 Q. So you've got 25 plus years --

21 A. Approximately.

22 Q. -- experience on air pollution control issues.

23 A. Yes, sir.

24 Q. All right. What academic training do you have for
25 your job at DEP?

1 A. I have a Bachelor's Degree in Chemical Engineering
2 from the University of Florida in 1971, a Master's Degree in
3 Environmental Engineering with a specialty in air pollution
4 from the University of Florida in 1976.

5 Q. Are you a Registered Professional Engineer in
6 Florida?

7 A. Yes, sir.

8 Q. Approximately how many projects have you reviewed
9 for compliance with air quality regulations?

10 A. At my present job, approximately 100.

11 Q. Have you ever testified before as an expert witness
12 regarding air quality issues?

13 A. Yes, I have.

14 Q. I'd like you to take a look at Exhibit 19 and tell
15 me whether Exhibit 19 is a true and correct copy of your
16 resume'.

17 A. Yes, it is.

18 Q. Does your resume' accurately summarize your
19 academic and professional accomplishments?

20 A. It does.

21 Q. All right, sir.

22 MR. DEE: Your Honor, at this time
23 Oleander would proffer Mr. Linero as an
24 expert regarding air pollution control
25 issues, the DEP regulations that govern

1 new sources of air pollution and air
2 permitting.

3 JUDGE: Mr. Goorland?

4 MR. GOORLAND: No objection.

5 JUDGE: Mr. Rowe?

6 MR. ROWE: No objection.

7 JUDGE: The Witness is accepted as
8 an expert for the purposes tendered
9 without objection.

10 BY MR. DEE:

11 Q. Mr. Linero, were you involved in DEP's review of
12 the permit application that was filed by Oleander for its
13 project here in Brevard County?

14 A. Yes, I was.

15 Q. What did DEP do to evaluate the application in this
16 case?

17 A. I received the application and I gave it an initial
18 review and assigned it to two experts from my staff.

19 They, they're required to, first of all, check that
20 the fee is correct, evaluate it for completeness. They have
21 a 30-day period to evaluate it to make sure that it meets all
22 the requirements of a PSD application and an air construction
23 permit application, per our rules.

24 They did so and then they went on to evaluate it to
25 ensure that, that the control measures detailed therein

1 complied with our requirements for best available control
2 technology. And also, that the ambient air monitoring or
3 ambient air modeling impacts were correctly done and that the
4 impacts were within allowable parameters in accordance with
5 the national ambient air quality standards and the increments
6 that apply to non attainment -- to attainment areas.

7 Q. Did the Department request additional information
8 from Oleander to ensure the Department had all the
9 information it needed to evaluate the application?

10 A. Yes, we did.

11 Q. And did I correctly understand you to say that the
12 Department reviewed the modeling analyses and the impact
13 assessments that were presented with the application?

14 A. The Department did.

15 Q. Did the Department independently confirm the
16 accuracy of those evaluations?

17 A. Yes, the Department did.

18 Q. All right, so, in effect, the Department duplicated
19 the analysis that was performed by Oleander.

20 A. The Department approved the work done by Oleander.

21 Q. All right.

22 A. I can't say without consulting with my expert that
23 we duplicated it.

24 Q. You verified it.

25 A. Yes, sir.

1 Q. All right. You mentioned the DEP sent written
2 requests for additional information. I'd like you to take a
3 look at Exhibits Two, Three, Four and Five and tell me
4 whether those are the documents the DEP sent to Oleander as
5 part of the Department's review of the application in this
6 case.

7 A. Yes, they are, three of them were documents
8 prepared by the Department. One of them was a document
9 prepared by the Fish and Wildlife Service.

10 Q. All right. And that document for Fish and Wildlife
11 Service was forwarded from the DEP?

12 A. Yes, sir.

13 Q. Did DEP provide an opportunity for the public to
14 offer comments about the project?

15 A. Yes, we did.

16 Q. Did you publish -- did you hold public meetings?

17 A. We held two public meetings for this project.

18 Q. Did the Department publish notice of those
19 meetings?

20 A. The Department published notice on -- oh, yes,
21 the Department did publish notice of both meetings.

22 Q. I'd like you to take a look at Exhibit Seven and
23 Eight and confirm for me that those were the notices
24 furnished by the Department for the public meetings.

25 A. I confirm that Exhibit Seven is the notice

1 published by the Department in the Florida Administrative
2 Weekly for the meeting of March the 3rd. Did you say Exhibit
3 Eight?

4 Q. Yes, sir.

5 A. Yes, this is the notice that we published in the
6 Orlando Sentinel on February 23rd for a meeting scheduled
7 March 30th.

8 Q. All right, sir. In this case have DEP and Oleander
9 satisfied all of the DEP notice requirements that are
10 applicable to the permit application that is now before us?

11 A. These satisfy an additional meeting that we had, an
12 additional meeting that we had that is not normally a
13 requirement of the review process.

14 In a subsequent notice, we satisfied the notice
15 requirements for a PSD application.

16 Q. And that would be Exhibit 12 that you're referring
17 to?

18 A. Let me have a look. Yes, sir, Exhibit 12 satisfies
19 the public notice requirements for a Notice of Intent for DEP
20 application.

21 Q. So just to be clear, in this case DEP and Oleander
22 have satisfied all of the notice requirements.

23 A. Yes, sir.

24 Q. Now, we heard from Mr. Zwolak that approximately 80
25 people attended the meeting on March 3rd. Approximately how

1 many people attended the meeting on March 13, 1999?

2 A. On the -- what date?

3 Q. The second meeting on May 13.

4 A. I think about 20. I think about 20 were there and
5 about 10 stayed for most of the meeting.

6 Q. Did you -- did the Department receive written or
7 verbal comments about this project from the public either
8 during or after the public meetings?

9 A. Yes, we did, we received quite a number of comments
10 even before the first public meeting. Some of those comments
11 were in the form of letters, numerous phone calls and quite a
12 number of electronic mail submittals.

13 Q. Did the Department consider those comments before
14 the Department formulated its decision in this case
15 concerning the permit application?

16 A. Yes, we did consider those comments and those
17 comments were discussed with, with Oleander and, certainly,
18 those comments had quite a bit to do with Oleander reducing
19 its fuel oil hours from 2,000 to 1,000.

20 Q. And based on your experience in general and your
21 work on this project, have you formed a professional opinion
22 as to whether the emission limits and control technologies
23 proposed by Oleander in this case represent the best
24 available technology for the Oleander Power Project?

25 A. Yes, for this type of project, the limits on gas

1 are the lowest that I've heard of in the country for what's
2 called an attainment area operating as a simple cycle
3 project. For oil, they're equaling to the best available
4 control technology.

5 Q. Have you formed a professional opinion as to
6 whether the Oleander Power Project will cause or contribute
7 to violations of any state or federal ambient air quality
8 standards?

9 A. Yes, I have.

10 Q. And what is your opinion, sir?

11 A. That the Oleander Project will not cause or
12 contribute to any violation of a national ambient air quality
13 standard or allowable increment.

14 Q. So it will not cause or contribute to a violation
15 of any applicable PSD increment?

16 A. Yes, sir, that's correct.

17 Q. Have you formed a professional opinion whether the
18 Oleander Power Project complies with all the DEP applicable
19 statutes, rules, policy and guidance concerning air quality
20 issues?

21 A. Yes, I have.

22 Q. And what is your opinion?

23 A. That it does comply with all applicable rules and
24 regulations.

25 Q. When DEP reviews a PSD permit application, does DEP

1 evaluate environmental justice issues?

2 A. No.

3 Q. I'd like you to take a look at Exhibit 32, which is
4 a letter from DEP to Mr. Rowe.

5 A. Yes, sir.

6 Q. All right, does that Exhibit accurately reflect the
7 Department's position with regard to environmental justice
8 issues, PSD permitting cases?

9 A. Yes, it does. It was prepared by our office
10 general counsel and it is my understanding it is the
11 Department's position on the matter and rules.

12 Q. All right, sir. When DEP reviews the permit
13 application, does DEP review the impact of the project's
14 airborne emissions on water quality?

15 A. No.

16 Q. Does the Department have any rules or other
17 criteria to use for evaluating environmental justice issues
18 or the water quality impacts associated with airborne
19 emissions?

20 A. There are no rules at all for environmental
21 justice. You can look at impacts on water quality from the
22 standpoint of the impacts of the control equipment that is
23 applied to minimize the air emissions. If that control
24 equipment itself has an impact on water quality or solid
25 waste, then you can take that into consideration. But not

1 from the emissions by the project itself. It's primarily the
2 impacts of the control equipment.

3 Q. So the Department would not look at the question of
4 whether the airborne emissions are causing adverse water
5 quality impacts.

6 A. No.

7 Q. All right, sir. Now, has the Department made a
8 preliminary decision in this case as to whether it should
9 issue a PSD permit to Oleander?

10 A. Yes, we issued a preliminary determination that we
11 should issue a permit to Oleander for this project.

12 Q. That's Exhibit 11?

13 A. Yes, it is.

14 Q. All right. Did you prepare or supervise the
15 preparation of Exhibit 11?

16 A. I supervised the preparation of Exhibit 11.

17 Q. And Exhibit 11 reflects the official position of
18 the Department with regard to the Oleander application?

19 A. It does.

20 Q. All right. To the best of your knowledge, are the
21 statements contained in Exhibit 11 accurate and correct?

22 A. Yes, they are.

23 Q. Do you adopt the statements in Exhibit 11 as part
24 of your testimony today?

25 A. I do.

1 Q. Has the Department received reasonable assurance
2 that Oleander will be able to comply with all the emission
3 limits and emission conditions contained in Exhibit 11?

4 A. Yes.

5 MR. DEE: Your Honor, at this time
6 I'd like to move the following Exhibits
7 into evidence.

8 JUDGE: Go ahead.

9 MR. DEE: Exhibits 2, 3, 4, 5 7, 8,
10 11, 19 and 32.

11 JUDGE: Mr. Goorland?

12 MR. GOORLAND: No objection.

13 JUDGE: Mr. Rowe?

14 MR. ROWE: No objection.

15 JUDGE: Oleander's Exhibits 2, 3, 5 7,
16 8, 11, 19 and 32 are admitted in evidence
17 without objection. I already have 7 and 8
18 in.

19 MR. DEE: Wonderful.

20 JUDGE: So they're in.

21 (Whereupon, Oleander's Exhibits 2, 3, 5, 11,
22 19 and 32 were marked and received in evidence.)

23 JUDGE: Go ahead, Mr. Dee.

24 MR. DEE: I have no further questions
25 for this Witness.

1 JUDGE: Further direct?

2 MR. GOORLAND: No, sir.

3 JUDGE: Cross?

4 MR. ROWE: Yes.

5

6

CROSS EXAMINATION

7

BY MR. ROWE:

8 Q. You had testified that the meetings were announced,
9 I think the Exhibit was Exhibit Seven in the Florida Weekly
10 or the Florida Week?

11 A. Yes, sir, in the Florida Administrative weekly.

12 Q. Where is that paper circulated at?

13 A. It's not a newspaper, as such.

14 Q. What is it?

15 A. It was not a newspaper, it is a publication of all
16 the actions of all of the State agencies.

17 Q. Who would normally get that information?

18 A. Primarily -- primarily attorneys, consultants,
19 Government officials. That's who would primarily get this
20 newspaper.

21 Q. Would you classify --

22 A. I'm sorry, not a newspaper but Florida
23 Administrative Weekly.

24 Q. Would you classify that as public notice of
25 advertising to the people of Brevard County that Oleander has

1 a project going on here that should be publicly notified?

2 A. This in and of itself, no, because it in and of
3 itself doesn't meet the requirements of Chapter 50 of the
4 Florida Statutes.

5 But together with the advertisement in the Orlando
6 Sentinel, it does satisfy all the requirements.

7 Q. You said Exhibit Seven does not meet the
8 requirement but, yet, you testified that it did. Am I
9 correct?

10 A. I believe I've testified that, by itself, Exhibit
11 Seven, doesn't meet the requirements, but Exhibit Seven and
12 Eight --

13 Q. No, I mean --

14 A. -- notices the same meeting, together they do meet
15 the requirements. And Eight alone meets the requirements by
16 itself.

17 Q. No, I was talking about when Attorney Dee was
18 asking you the question, you stated that that did meet the
19 requirements.

20 A. It met one of the requirements, which is that all
21 of our public meetings must be advertised in Florida
22 Administrative Weekly. All of them must be advertised there
23 as a requirement of the Administrative Procedures Act.

24 Q. I don't have a problem there. My problem is people
25 here in Brevard County that have a concern, the public

1 citizens, especially that I refer to with vested rights, were
2 not aware of that particular paper that you just stated, we
3 don't get it, anyway.

4 The other question I have for you, the Orlando
5 Sentinel, would you consider that a local paper for local
6 people?

7 A. I consider it a newspaper with general circulation
8 that satisfies the requirements of Chapter 50.

9 Q. Would you consider it a local newspaper?

10 A. I don't live here locally, but my sense is that
11 many people do subscribe to the Orlando Sentinel and it is
12 available at the hotel where I stay.

13 Q. Uh-huh. Can you answer my question, please? Could
14 you give me a yes or no?

15 A. Could you restate your question.

16 Q. The question was do you consider the Orlando
17 Sentinel a local paper for Brevard County and its citizens?

18 A. I consider it a Brevard edition of the Orlando
19 Sentinel local paper.

20 Q. That wasn't the question. The question was the
21 Orlando Sentinel. That's okay, we don't have to beat up on
22 that.

23 The other question is in reference to the April 8
24 advertisement, that was done in Florida Today. I think
25 that's -- I done forgot what Exhibit that is.

1 MR. DEE: Twelve.

2 BY MR. ROWE:

3 Q. What kind of time limit is required to give public
4 notice? Is there a time that says if I give you public
5 notice and say, hypothetically, in ten days if I don't hold a
6 meeting within that period of time I have to readvertise to
7 let you know that it's going to be held at another time?

8 A. One -- there are a number of requirements and
9 constraints. And one of them is that we have to provide
10 public notice well in advance of the public hearing. And
11 that's what this notice would have done, it would have met
12 the requirement to, to give sufficient time, sufficient
13 public notice of the meeting.

14 Q. Which one?

15 A. The second one.

16 Q. Because that was a meeting that was held that very
17 few people knew of and a lot of phone calls were made to try
18 to entice people. I think you testified that there were
19 probably about 30 people there.

20 I was there and I was quite upset and I brought
21 that to the concern. And a lot of people walked out because
22 they weren't satisfied, that the general public that was
23 there would not have been there because they did not know
24 about that particular meeting because it was not noticed in
25 the April 8th advertisement. That's almost 30, I don't know

1 how many days later after the April 8th meeting.

2 There was also some concerns, I think the
3 Commissioners wrote letter, the Chairman, Mr. Scarborough,
4 wrote letters in reference to that concerns pertaining to
5 public notice and the meeting itself, plus some of the
6 citizens wrote letters pertaining to that.

7 MR. DEE: Excuse me, Mr. Rowe, if
8 there's a question, I'd like to hear
9 the question. I hear a lot of testimony
10 about Mr. Rowe --

11 MR. ROWE: I'm sorry, I'm sorry, I'm
12 getting my feet wet, I'm learning.

13 BY MR. ROWE:

14 Q. The question is did you receive any correspondence
15 from the Chairman of the Commissioners pertaining to the
16 advertisement of the meeting of April 13th?

17 A. Yes, the Department received a letter from the
18 Chairman.

19 Q. Did you receive any correspondence from the general
20 public in reference to concern about that May the 13th
21 meeting and, if so, about how many letters or correspondence
22 you might have received?

23 A. I don't recall seeing any. It's possible that one
24 of my staff may have received these letters and might know of
25 this. But I myself am only familiar with the correspondence

1 from Chairman Scarborough.

2 Q. Who would be responsible for responding to these
3 correspondence?

4 A. Yes, I took the responsibility of replying to
5 Chairman Scarborough.

6 Q. What about the general public, though, the
7 citizens?

8 A. One of my staff would have initiated the response.
9 I'm not aware if there was any response. I'm not aware they
10 would have received any other comments in writing.

11 Q. Would your staff respond on general principle
12 without your blessing or direction?

13 A. Well -- could you repeat that question?

14 Q. I say would your staff just arbitrarily respond to
15 something without your permission or blessing to, to probably
16 give some guidance in how to respond to some concerns?

17 A. They would check with me if they had something they
18 felt warranted a response, needed a response, and I would go
19 along with it, if they did.

20 Q. So based on the fact that -- am I to understand you
21 that no one brought information to you that they had received
22 correspondence from the general public concerning that
23 April -- not April, May 13th meeting?

24 A. No one brought anything to my attention.

25 Q. Okay, thank you, sir. In your response to the

1 Chairman, Commissioner Scarborough, could you just kind of
2 give a brief summary of what that stated?

3 A. Yeah, I don't have that correspondence --

4 MR. DEE: Your Honor, I'd like to
5 object at this point, I'm not sure that
6 correspondence between the Department
7 and one of the County Commissioners is
8 in any way relevant to the issuance of
9 this permit.

10 JUDGE: Mr. Goorland?

11 MR. GOORLAND: I don't know if it's
12 actually available. I haven't seen it.
13 So I'd like to see it before I do.
14 Otherwise, I have no position on that.
15 I mean, I want to see it.

16 JUDGE: Mr. Rowe?

17 MR. ROWE: I think it's important
18 because it did have a concern it was as
19 related to be and advertised and people
20 that had concerns was supposed to know,
21 and at that particular time there was
22 no such animal as far as the proper
23 advertisement.

24 It was advertised in the April 8th
25 today's paper, but the meeting was held

1 the 13th. The meeting that was advertised
2 April 8th was a meeting that was held prior
3 to.

4 JUDGE: Okay, it's irrelevant and
5 immaterial, why is it irrelevant and
6 immaterial, to what standard and
7 requirement?

8 MR. ROWE: I think it shows a concern
9 on the part of the citizens that they were
10 not aware of the meeting and that the
11 Chairman of the Board as well as other
12 citizens did write correspondence to that
13 effect.

14 JUDGE: Anything further, Mr. Dee?

15 MR. DEE: This line of questioning
16 is not relevant to whether the Applicant
17 has complied with the applicable
18 standards so it's irrelevant and --

19 JUDGE: The objection is sustained.
20 Ask your next question.

21 MR. ROWE: I have no further questions.
22 Your Honor, if it's possible, these are
23 some of my exhibits --

24 JUDGE: Do it in your case in chief.

25 MR. ROWE: Sir?

1 JUDGE: Do it in your case in chief.

2 MR. ROWE: That's all right, I won't
3 even ask you.

4 JUDGE: Redirect.

5 MR. DEE: I have no questions for
6 this Witness, Your Honor, no further
7 questions.

8 JUDGE: You're excused from your oath,
9 you're excused as a Witness.

10 THE WITNESS: Okay.

11 JUDGE: Call your next witness.

12 MR. DEE: There are no further witnesses,
13 Your Honor.

14 JUDGE: Any other exhibits?

15 MR. ROWE: Yes, sir.

16 JUDGE: No --

17 MR. ROWE: Sorry about that. I'm going
18 to learn.

19 MR. DEE: No, sir, Your Honor, I have
20 no further exhibits.

21 JUDGE: Is 18 in evidence?

22 MR. DEE: Thank you. 18 is the resume'
23 of Mr. Halpin, who's an employee at the
24 Department. He was not called to testify,
25 so it's unnecessary to introduce that

1 Exhibit.

2 JUDGE: So 18 is withdrawn.

3 MR. DEE: Yes, sir. And then Exhibit
4 45 for rebuttal are basically -- it's a
5 placeholder at this point, there's been
6 no rebuttal so didn't need to take any
7 action on Exhibit 45.

8 JUDGE: Okay, Mr. Goorland, is the
9 Department going to submit evidence?

10 MR. GOORLAND: No, Your Honor.

11 JUDGE: Okay, let's take a five-minute
12 recess and we'll come back.

13 MR. DEE: Thank you.

14 JUDGE: Mr. Rowe, we'll come back for
15 your case in chief.

16 MR. ROWE: All right, thank you.

17 (Whereupon, a recess was taken in the
18 proceedings.)

19 JUDGE: Okay, we're back on the record.

20 Mr. Rowe, call --

21 MR. ROWE: Yes, sir.

22 JUDGE: -- call your first witness.

23 MR. ROWE: Can I introduce -- I think
24 you said I can do this. The documents --

25 JUDGE: You want to submit some documents

1 in evidence?

2 MR. ROWE: Yes, sir.

3 JUDGE: Okay, what is --

4 MR. ROWE: I need some clarification,
5 I'm not sure what I'm doing, but I'm going
6 to ask --

7 JUDGE: First of all, let's identify
8 your documents.

9 MR. ROWE: Okay, this one here is a
10 deposition that was taken --

11 JUDGE: This one here is Petitioner's
12 Three?

13 MR. ROWE: And it does have the, I
14 guess, discoveries that I've given to Mr.
15 Dee and they're marked as Exhibit et cetera,
16 et cetera. I wasn't sure if this is already
17 in the record or not. And if it's not, I
18 would certainly like to make it a part of
19 the record.

20 JUDGE: What are the responses to
21 discovery by document title? Is it Response --
22 Answers to Interrogatories?

23 MR. ROWE: Yes, sir.

24 JUDGE: -- Responses to Request for
25 Admissions?

1 MR. ROWE: Yes, sir.

2 JUDGE: Responses to Request to Produce?

3 MR. ROWE: Yes, sir, I think so.

4 JUDGE: So Petitioner's Three is an exhibit
5 consisting of Petitioner's Answers to
6 Interrogatories, Petitioner's Responses to
7 Request for Admissions and Petitioner's
8 Responses to Request to Produce.

9 Mr. Dee, have you had an opportunity
10 to review Petitioner's Three?

11 MR. DEE: I'm not sure that we've got
12 an accurate description of Three. I
13 thought when Mr. Rowe started to talk about
14 his deposition --

15 MR. ROWE: Well, this is --

16 MR. DEE: -- and the exhibits that were
17 attached to your deposition --

18 MR. ROWE: That's what I thought I did.

19 MR. DEE: Well, there are no Answers to
20 Interrogatories or Requests to Produce
21 attached to it. I have no objection to Mr.
22 Rowe's objection going into the record, if
23 that's what he's trying to introduce.

24 MR. ROWE: Uh-huh.

25 MR. DEE: So attached, Your Honor.

1 JUDGE: Wait just a minute.

2 MR. DEE: Yes, sir.

3 JUDGE: Let's clear the record up on
4 what we're talking about.

5 MR. DEE: Yes, sir.

6 JUDGE: Petitioner's Three is a copy
7 of, a transcript of Mr. Rowe's deposition?

8 MR. DEE: Yes, sir.

9 JUDGE: Go ahead, Mr. Dee.

10 MR. DEE: Attached to the deposition
11 are various exhibits including some
12 correspondence, and I have no objection to
13 the first five deposition exhibits.

14 The sixth is Mr. Rowe's Petition, I
15 have no objection to that.

16 Seven is some correspondence from
17 Golder to DEP, I have no objection to that.

18 Eight is a map showing the location
19 of his house, I have no objection to that.

20 Exhibit Nine, however, is a letter
21 from DEP to Mr. Rowe with a list of impaired
22 waters and a map of Section 303(D), listed
23 waters for Brevard County. This is a hearsay
24 document, and I would object to that on the
25 grounds that it's hearsay.

1 I would also object to Deposition
2 Exhibit Number 10, which appears to be a
3 document that was downloaded off the Internet.
4 And it's a list of various water bodies,
5 again presumably impaired or affected. Also
6 attached to 10 are some newspaper articles,
7 apparently, that, again, are hearsay.

8 JUDGE: Okay so -- go ahead. Is that
9 it?

10 MR. DEE: Yes, sir.

11 JUDGE: So the objectionable documents
12 in Petitioner's Three are the Exhibit Nine
13 to the deposition?

14 MR. DEE: Yes, sir, and 10.

15 JUDGE: And 10.

16 MR. DEE: Yes, sir.

17 MR. GOORLAND: Your Honor, I have no
18 record of this in my file. And I don't know
19 if Mr. Rowe has attempted to provide this
20 to the Department before --

21 MR. ROWE: No.

22 MR. GOORLAND: -- or if he has a copy
23 for me now.

24 MR. ROWE: I can get a copy.

25 MR. GOORLAND: I also, if you wouldn't

1 mind me looking --

2 MR. ROWE: Go right ahead.

3 MR. GOORLAND: Your Honor, I'll support
4 Mr. Dee's Motions.

5 JUDGE: Okay. I'm going to take -- make
6 the Exhibits 9 and 10 attached to the
7 deposition of Mr. Rowe and make them
8 Petitioner's Four and delete them from
9 Petitioner's Three.

10 MR. ROWE: May I ask a question, Your
11 Honor?

12 JUDGE: Sure.

13 JUDGE: With that change made, is there
14 any objection to Petitioner's Three?

15 MR. DEE: No, sir.

16 MR. GOORLAND: No, sir.

17 JUDGE: Petitioner's Three is admitted
18 in evidence without objection.

19 (Whereupon, Petitioner's Exhibit Number Three was
20 marked and received in evidence.)

21 JUDGE: Let's take up Petitioner's --
22 do you have anything else you want to add,
23 Mr. Rowe?

24 MR. ROWE: Yes, sir, I had a question
25 in reference to --

1 JUDGE: Four?

2 MR. ROWE: -- the deletion.

3 JUDGE: We're going to come back to it,
4 Mr. Rowe.

5 MR. ROWE: Oh, you were?

6 JUDGE: Yes. Petitioner's Five?

7 MR. ROWE: What I have is -- let me
8 have Petitioner's Three.

9 MR. ROWE: Oh.

10 JUDGE: Is that your only copy, Mr. Rowe?

11 MR. ROWE: Yes, sir, because I knew he
12 had one but I wasn't aware I had to give you
13 one. But I'll get you a copy.

14 JUDGE: This is your only copy?

15 MR. ROWE: No, sir.

16 JUDGE: It's not.

17 MR. ROWE: No, sir.

18 JUDGE: Petitioner's Five.

19 MR. ROWE: These are other information
20 that I gave to Mr. Dee in reference to during
21 the time of the deposition --

22 JUDGE: Show it to opposing Counsel.

23 MR. ROWE: Oh. During the time of the
24 deposition, I made him aware that there was
25 other information forthcoming. And I have

1 since given him that information, as well.
2 There are newspaper articles downloaded
3 from the, what do you call it, web site,
4 a list of my immediate family and addresses,
5 other documentation from Golder and
6 Associates and DEP.

7 And what those documents do, they
8 did have other polluters within Brevard
9 County and other toxins and stuff of that
10 nature.

11 JUDGE: You need some time, Mr. Dee?

12 MR. DEE: Not especially, no, sir.
13 I'm trying to make this simple for all of
14 us. The first set of documents Mr. Rowe
15 has produced here are documents that
16 apparently were downloaded from the
17 Internet from a web page produced by the
18 Environmental Defense Fund.

19 Those documents are all hearsay
20 documents, to which we would object. So
21 I'd like to treat that as one set, just
22 to make this easier, if you wanted to
23 call that Five.

24 JUDGE: All right, for identification
25 purposes, then, the Internet documents from

1 the Environmental Defense Fund, Petitioner's
2 Five.

3 MR. DEE: If you want, I can pass those
4 to you.

5 MR. DEE: We've got at least two newspaper
6 articles --

7 JUDGE: This is Petitioner's Six?

8 MR. DEE: Yes, sir. Again, hearsay.
9 No offense to our reporter, our reporter here.

10 MR. SCHWEERS: It's not my byline.

11 JUDGE: Just a minute.

12 MR. DEE: Yes, sir.

13 JUDGE: Petitioner's Seven.

14 MR. DEE: Petitioner's Seven would be
15 a composite exhibits of several documents
16 which I believe are already in evidence.
17 There's a March, 16, 1999, Technical
18 Evaluation and Determination.

19 JUDGE: And that's what Exhibit?

20 MR. DEE: Exhibit 11 of the Applicant.

21 JUDGE: Do you agree or disagree with
22 that characterization, Mr. Rowe?

23 MR. ROWE: If he says it's there, he
24 has a better memory than I, I would agree.

25 JUDGE: All right.

1 MR. DEE: As part of Seven, I would
2 just -- to make life simpler, there are
3 several letters to and from DEP that I
4 believe are also already admitted as
5 exhibits.

6 JUDGE: Which exhibits?

7 MR. DEE: There is a letter dated December
8 17th from DEP to Oleander, that would be
9 Exhibit Three.

10 JUDGE: All right.

11 MR. DEE: There is a letter dated
12 December 22 from DEP to Oleander which is
13 the same as Oleander's Exhibit Five.
14 And there is a letter -- and I will point
15 out these DEP letters and documents
16 apparently were downloaded from the
17 Department's web page, so I can't tell
18 without further review as to whether
19 they're identical to the ones that have
20 already been introduced.

21 But based on the assumption that
22 they're the same as the documents in the
23 record, I don't have any objection to it.

24 And then finally, there is a letter
25 dated February 1, 1999, from Golder which

1 has previously been introduced as Oleander's
2 Exhibit Number Six, and I have no objection
3 to that document being introduced by Mr. Rowe.

4 JUDGE: Okay, let me have those.

5 MR. DEE: Yes, sir. We have some other
6 documentation here. There's a letter --

7 JUDGE: This is Petitioner's Eight?

8 MR. DEE: Yes, Your Honor. I'm sorry.

9 JUDGE: Go ahead.

10 MR. DEE: There is a letter or document
11 prepared by Mr. Rowe dated August 18, 1999,
12 which identifies his children, grandchildren
13 and other family members. We have no objection
14 to the introduction of that document.

15 We have as Petitioner's Nine the document
16 apparently consisting of 38 pages which on the
17 cover says Area Report, paren, TRI data, and
18 it apparently was downloaded off the Internet.

19 Again, this is a hearsay document and
20 we would object to Exhibit Nine.

21 And then there are, I guess Ten is an
22 unlabeled document labeled major air pollution
23 sources in Brevard County. I don't have a
24 clue as to where that came from. But again,
25 it would be hearsay. I don't have any idea

1 where this came from.

2 And then I've got a document entitled
3 Comparison of Air -- it again would be hearsay,
4 in any event, and that would be Number 11,
5 it's Comparison of Air Quality Data with
6 National Ambient Air Quality Standards.

7 MR. ROWE: May I comment in reference
8 to that document?

9 JUDGE: Sure. Just a minute.

10 MR. DEE: As Number 12, we've got another
11 document with -- on the upper right hand corner
12 it says Eight-Hour Averages and it shows
13 various years on the top of the page and on
14 the side of the page it identifies various
15 counties. Again, it's a hearsay document.
16 I'm not sure what it's intended to demonstrate.

17 JUDGE: This is Petitioner's 12?

18 MR. DEE: Twelve, yes, sir.

19 JUDGE: What's the title on Petitioner's
20 12?

21 MR. DEE: There is no title.

22 JUDGE: Mr. Rowe, what is Petitioner's
23 12?

24 MR. DEE: Your Honor, that document
25 we've identified as Number 12 apparently was

1 attached to a letter from DEP dated August 16,
2 1999. So this DEP letter and that attachment
3 presumably should be together.

4 MR. ROWE: Along with that piece there,
5 too, whatever that number might be on it.

6 JUDGE: As part of 11?

7 MR. ROWE: Uh-huh, all of that came with
8 the letter. I guess the paper clip came off
9 of it.

10 MR. GOORLAND: It's all 11.

11 JUDGE: Okay.

12 MR. DEE: So then 11 and 12 become --

13 JUDGE: No, there is no 12, unless you
14 have more.

15 MR. DEE: Well, as a matter of fact --
16 and then 12 is, there are two separate sets
17 of documents that apparently were downloaded
18 off the Internet. Both of them have a cover
19 page with a map, and on the lower right hand
20 side of the cover page it says EPA and it
21 refers on the upper right hand side to Brevard
22 County, Florida.

23 Again, these are hearsay documents. And
24 that would be 12.

25 MR. GOORLAND: It appears to show a number

1 of facilities in Brevard County. It doesn't
2 say what kind of facilities. This second one
3 appears to have a demographic map and a list
4 of facilities attached to it in Brevard County.
5 These are off the EPA data base, TRI inventory.

6 MR. DEE: To summarize, Your Honor --

7 JUDGE: Just a minute.

8 MR. DEE: Yes, sir.

9 JUDGE: All right, to summarize?

10 MR. DEE: Yes, sir, Exhibit Five, the
11 documents from the Environmental Defense Fund,
12 the Exhibit Six, the newspaper articles, Nine,
13 the Internet documents, 10, the Major Source
14 Inventory, 11 and 12 are all hearsay documents
15 and for that reason, we would object to the
16 admission of those documents.

17 JUDGE: Okay, let's take up what you
18 have no objection to, first. Petitioner's
19 Three, no objection?

20 MR. DEE: Yes, sir.

21 JUDGE: That's the deposition of Mr.
22 Rowe --

23 MR. DEE: That's correct, yes, sir.

24 JUDGE: -- with attached Exhibits One
25 through Eight.

1 MR. DEE: Yes, sir.

2 JUDGE: Petitioner's --

3 MR. DEE: Seven.

4 JUDGE: -- Seven is a Composite Exhibit,
5 Technical Evaluation, including -- these are
6 cumulative of Oleander's Three, Five and Six.

7 MR. DEE: Yes, sir.

8 JUDGE: And you have no objection to
9 those.

10 MR. DEE: That is correct.

11 JUDGE: Mr. Goorland, any objection to
12 Petitioner's Seven?

13 MR. GOORLAND: No.

14 JUDGE: Petitioner's Three, any objection
15 to Petitioner's Three, Mr. Goorland?

16 MR. GOORLAND: No.

17 JUDGE: All right, Petitioner's Three
18 is admitted in evidence without objection.
19 Petitioner's Seven, you had no objection,
20 Mr. Goorland?

21 MR. GOORLAND: That's correct.

22 JUDGE: Admitted in evidence without
23 objection.

24 (Whereupon, Petitioner's Exhibit Number Seven
25 was marked and received in evidence.)

1 JUDGE: Petitioner's Eight is a
2 document prepared by Mr. Rowe identifying
3 his family members, is that correct?

4 MR. ROWE: Correct, sir.

5 JUDGE: Mr. Dee, you have no objection
6 to that. Mr. Goorland?

7 MR. GOORLAND: I'm concerned about the
8 relevance of that document, Your Honor.

9 JUDGE: Why is it relevant, Mr. Rowe?

10 MR. ROWE: It was something that Mr.
11 Dee had stated in reference to defending
12 the welfare of my children and grandchildren
13 and future in reference to adverse
14 environmental impact, and I was trying to
15 show that I did have children and grandchildren
16 in the immediate area and that I do have a
17 concern about their health and welfare as
18 far as environmental impact is concerned.

19 JUDGE: Petitioner's Eight is rejected
20 pursuant to objection by Mr. Goorland,
21 irrelevant and immaterial.

22 Now, that's all of the exhibits to
23 which you have no objection, Mr. Dee.
24 Everything else you object to?

25 MR. DEE: That is correct.

1 JUDGE: Okay, Petitioner's Four are
2 Exhibits Nine and Ten that were originally
3 attached to Petitioner's Three. Mr. Dee,
4 you've stated your objections as hearsay?

5 MR. DEE: Yes, sir.

6 JUDGE: Mr. Goorland, do you have
7 objection to Petitioner's Four?

8 MR. GOORLAND: I have the same.

9 JUDGE: Mr. Rowe, would you like to
10 respond?

11 MR. ROWE: What was the exhibit number
12 for this one, from DEP?

13 MR. DEE: That, I believe, is Number 11.

14 JUDGE: Let me see the date on that.
15 Yes, sir, that is Petitioner's 11. We're
16 not to Petitioner's 11, yet.

17 MR. ROWE: Was that accepted or rejected?

18 JUDGE: We're not to Petitioner's 11,
19 yet. Mr. Goorland and Mr. Dee have both
20 objected to Petitioner's Four, this is your
21 opportunity to respond to the objection.

22 MR. ROWE: I have to see it.

23 JUDGE: Petitioner's Four, that is Exhibit
24 Nine and Ten to your deposition.

25 MR. ROWE: Oh, the orange book, the thing

1 there?

2 JUDGE: Petitioner's Four is a Composite
3 Exhibit consisting of Exhibits Nine and Ten
4 that were originally attached to your deposition.

5 MR. ROWE: Oh. I think it's important --

6 JUDGE: The objection's hearsay, not
7 whether you think it's important. It's an
8 out-of-court -- the objection is it's an
9 out-of-court statement made by a party who
10 is not here to be cross examined and
11 doesn't fit within one of the exceptions
12 to the hearsay rule.

13 MR. ROWE: Let me say this, then, like
14 I said, I don't know what I'm doing, but
15 during the -- when I was requested to bring
16 that in, I thought I was doing what was
17 appropriate, what I understood it, to bring
18 that information in so there wouldn't be any
19 rabbits coming out of the hat, so to speak.

20 During the deposition, or the exchange
21 of the documents, there was no concern
22 voiced about the documents. And it appears
23 that they were being accepted based on the
24 fact that Mr. Dee did go ahead and exhibit
25 them within the deposition itself.

1 Whether they're accepted or not, I
2 felt that based on the fact that no issue
3 was raised during the time that we were
4 discussing them, that they had merit.

5 JUDGE: Petitioner's Four is rejected
6 pursuant to objection.

7 Petitioner's Five, Mr. Dee, you object
8 to this on the grounds that it's hearsay.
9 Mr. Goorland?

10 MR. GOORLAND: I haven't had an
11 opportunity to review exactly what's in the
12 material, so I'm not sure if there's any
13 relevance, either.

14 JUDGE: By either, do you mean join in
15 the hearsay objection?

16 MR. DEE: But you agree it's hearsay.

17 MR. GOORLAND: I do.

18 JUDGE: Mr. Rowe, do you wish to respond
19 to the hearsay and relevancy objections of
20 Petitioner's Five?

21 MR. ROWE: I've just got to peep at it
22 just a little bit.

23 I would request that the documents
24 remain due to the fact that they are
25 informational documents pertaining to

1 pollutants and chemicals in Brevard County.

2 And I think it can be substantiated.

3 JUDGE: Petitioner's Five is rejected
4 pursuant to objection.

5 Petitioner's Six, Mr. Dee, you object
6 to the newspaper articles as hearsay. Mr.
7 Goorland?

8 MR. GOORLAND: I also object, same
9 objection.

10 JUDGE: Mr. Rowe, do you wish to
11 respond to the objections?

12 MR. ROWE: Just do what you got to do,
13 Your Honor.

14 JUDGE: Petitioner's Six is rejected
15 pursuant to objection.

16 Petitioner's Nine is 38 pages of data.
17 Mr. Dee objects on the grounds that it's
18 hearsay. Mr. Goorland?

19 MR. GOORLAND: Same objection.

20 JUDGE: Mr. Rowe, do you wish to respond?

21 MR. ROWE: Your Honor, for clarification,
22 I guess due to my stupidity, why go through
23 all this hassle on a deposition and
24 interrogatories if they're going to mark them
25 as exhibits, then come back and reject them?

1 It's such a waste of time and what do you
2 call it, redundant?

3 JUDGE: I couldn't agree with you more.

4 Do you wish to respond to the hearsay objection?

5 MR. ROWE: I would like to see them remain.

6 JUDGE: Petitioner's Nine is rejected
7 pursuant to objection.

8 Petitioner's 10, Mr. Dee objects to
9 Petitioner's 10 on the grounds of authenticity
10 and hearsay. Mr. Goorland?

11 MR. GOORLAND: Same.

12 JUDGE: Mr. Rowe, do you wish to respond?

13 MR. ROWE: I don't think it's going to
14 do any good, but I would request that it stay.

15 JUDGE: Petitioner's 10 is rejected
16 pursuant to objection.

17 Petitioner's 11, Mr. Dee has objected
18 on the grounds of hearsay. Mr. Goorland?

19 MR. GOORLAND: Same.

20 JUDGE: Mr. Rowe?

21 MR. ROWE: Request that it remain.

22 JUDGE: Petitioner's 11 is rejected
23 pursuant to objection.

24 Petitioner's 12, Mr. Dee has objected
25 on the grounds of hearsay. Mr. Goorland?

1 MR. GOORLAND: Same.

2 JUDGE: Mr. Rowe, do you wish to respond?

3 MR. ROWE: I think I said something prior
4 to. Did we just reject Exhibit 11?

5 JUDGE: We did.

6 MR. ROWE: May I ask for clarification?
7 This is a correspondence from Environmental
8 themselves, this is a gentleman that works
9 with DEP and I'm trying to understand why
10 it's -- whatever. It appears to me that
11 these people should have some credibility
12 in reference to the documents that they're
13 furnishing to the public.

14 And I'm having a problem trying to
15 digest the information which they keep
16 and maintain and then give to the public
17 based on requests.

18 JUDGE: I've ruled. The objection is
19 to the, hearsay objection is to Petitioner's
20 12. Do you wish to respond to the hearsay
21 objection to Petitioner's 12?

22 MR. ROWE: Request that it remain.

23 JUDGE: Petitioner's 12 is rejected
24 pursuant to objection.

25 Call your first witness.

1 MR. ROWE: The first witness is Ms.
2 Juanita Barton.

3

4 WHEREUPON,

5

 JUANITA BARTON,

6 being first duly sworn by the Court Reporter to tell the
7 whole truth as hereinafter certified, was examined and
8 testified under the oath as follows:

9

 JUDGE: State your first and last

10 name and spell each name for the record.

11

 THE WITNESS: My name is Juanita,

12

 J U A N I T A, last name Barton, B A R T O N.

13

 JUDGE: Mr. Rowe.

14

15

 DIRECT EXAMINATION

16

 BY MR. ROWE:

17

 Q. Mrs. Barton, in reference to the proposed Oleander

18

Power Plant, what is your objection in reference to this

19

proposed plant?

20

 A. That's a hard question to answer because after

21

having heard all the expert testimony this morning, and later

22

this afternoon, I am not an expert, my objection is the

23

effect that it will have on the people who have to live with

24

the results once the soothsayers leave the area.

25

 Q. Would your objection be in reference to health or

1 endangered species?

2 A. All of the above.

3 Q. Could you elaborate, please?

4 A. One of my concerns when I went before the Board of
5 Commissioners is the effect that not only Oleander Plant but
6 pollution in itself is a concern of mine because of some of
7 the effects it has had on my family.

8 Last night I had to get a ticket for my sister to
9 fly to Chicago to take care of her daughter who's suffering
10 with cancer. She's not the only one of my family members
11 whose been affected by this. And that's why I've become
12 concerned. She's just the most recent.

13 Q. When you say she's not the only one, would you give
14 a number or other incidents where your family might be
15 affected according to environmental impact?

16 A. Well, because when my father moved here, being a
17 laborer, he was unaware of the fact that where our house was
18 sitting was where a grove of oranges had been and not only
19 had been, we were surrounded by oranges and they were
20 surrounded by pesticides. So we grew up with that sort of
21 thing.

22 And so my oldest sister has had a kidney removed
23 and she's had to go back for treatments for recurrence of
24 cancer.

25 My mom died of cancer. I have a niece who has

1 breast cancer and a niece who has lupus at this time.

2 Q: Do you see a benefit in reference to the Oleander
3 Power Plant being located in this particular community?

4 A. Not being -- not being that familiar with it, I
5 hesitate to answer that particular question. What I would
6 say, based on what I know about pollution and what I've seen
7 it do, I would say that we don't need any more pollution,
8 even if it's minuscule.

9 Q. So -- you can answer this with a yes or no or
10 however you desire. I think you live about 20 something
11 miles away from the proposed location. Do you honestly feel
12 that the emission from the Oleander Plant could possibly have
13 an impact on your family, yourself or anybody else?

14 A. Yes. Anything that can get into my water, can get
15 into the air I breathe, yes, it can have an effect.

16 Q. Is there anything that you would like to add to
17 your concerns in reference to the proposed plant and possible
18 effects?

19 A. I look around the room and I see the experts and I
20 see the people who are concerned about our community. I see
21 people who have vested interest, financial interest that this
22 plant go into place. But what price the dollar?

23 I know that even though it is an economic move for
24 some people and it may be an advantage to some of the people
25 in this room, a financial advantage, to me it would be, and

1 to my family and to many other families in the area where I
2 live, more pollution would not only be an economic
3 disadvantage, but it would be a disadvantage to the existence
4 of our families.

5 There are people who are technically better in this
6 room to speak to the issue of whether or not Oleander or any
7 other pollutant issues, I guess, will affect us.

8 But to speak to stats and censuses and all the
9 other technical things has nothing -- it's a good thing. But
10 when it comes down to my family picked off and dying one at a
11 time younger and younger, I can't equate that to any of the
12 statistics, there are no statistics out there to help me, to
13 quantify and to qualify how I feel.

14 And like most of us, if we're financially secure,
15 and it's never come to our door to knock and we've never seen
16 it happen to us, then we have no vested interest in what's
17 going on in other areas.

18 MR. ROWE: I have no further questions
19 at this time, Your Honor.

20 JUDGE: Cross, Mr. Dee?

21

22

CROSS EXAMINATION

23 BY MR. DEE:

24 Q. Mrs. Barton, do you live in Mims, Florida?

25 A. Yes, sir.

1 Q. That's approximately 21 miles away?

2 A. Approximately, yes.

3 MR. DEE: I have no further questions.

4 JUDGE: Further cross, Mr. Goorland?

5 MR. GOORLAND: No.

6 JUDGE: Further Redirect Mr. Rowe?

7 MR. ROWE: I have no further questions
8 for the Witness. I thank Mrs. Barton for
9 being here and expressing her concerns and
10 she's excused.

11 JUDGE: You're excused from your oath,
12 you're excused as a witness.

13 MR. ROWE: Your Honor, I had subpoenaed
14 some other people in reference to this subject
15 matter. However, based on the testimony of
16 the expert witnesses and a lot of the questions
17 that I had for those witnesses, I think it
18 would be redundant to attempt to re-address
19 them. And therefore, I will not call those
20 other witnesses that I had requested because
21 I feel that my concerns have been responded
22 to with the other expert witnesses.

23 JUDGE: Any other exhibits?

24 MR. ROWE: I don't have any.

25 JUDGE: Does Petitioner rest?

1 MR. ROWE: Petitioner rests.

2 JUDGE: All right. Any rebuttal?

3 MR. DEE: No, sir.

4 JUDGE: Mr. Goorland?

5 MR. GOORLAND: No, sir.

6 JUDGE: Oleander rests?

7 MR. DEE: Yes, sir.

8 JUDGE: Department rests?

9 MR. GOORLAND: Yes, sir.

10 JUDGE: Okay.

11 MR. ROWE: Your Honor, can I ask a
12 question for clarification?

13 JUDGE: Yes, sir.

14 MR. ROWE: All those Exhibits that
15 were rejected, does that mean -- I'm
16 trying to get -- because I really don't
17 know. Does that mean that they stay in
18 the record even though they have no,
19 whatever -- say, for example, I appeal
20 the decision, whatever, that it moves
21 forward, that this information will still
22 be intact?

23 JUDGE: The Exhibits that are rejected
24 are part of the record for appeal purposes --

25 MR. ROWE: Okay.

1 JUDGE: -- but they're not part of
2 the evidentiary record that I will consider
3 in making my decision.

4 MR. ROWE: Very good, thank you, sir.

5 JUDGE: Mr. Rowe, each side has the
6 opportunity, if they wish to exercise it,
7 to submit a proposed order in this case.
8 I will issue a Recommended Order.

9 The parties, if they wish to exercise
10 that right, will file Proposed Recommended
11 Orders in my office no later than 10 days
12 after the date the transcript is filed in
13 my office.

14 The Proposed Recommended Orders must
15 comply with the following requirements:

16 Each paragraph in the Proposed Findings
17 of Fact must be numbered, each paragraph
18 must cite to that portion or portions of
19 the record upon which it is relying for
20 its Proposed Findings and each paragraph
21 must consist of something other than
22 recited testimony. Any questions?

23 MR. ROWE: (No response.)

24 JUDGE: This hearing is adjourned.

25 (Whereupon, the proceedings were concluded at 4:27 p.m.)

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CERTIFICATE

STATE OF FLORIDA)
)
COUNTY OF BREVARD)

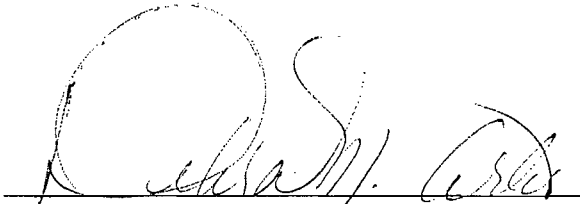
SS:

I, DEBRA M. ARTER, Registered Diplomate Reporter
and Notary Public in and for the State of Florida at Large,

DO HEREBY CERTIFY that the above-entitled and
numbered cause was heard as hereinabove set out; that I was
authorized to and did stenographically report the proceedings
and evidence adduced and offered in said hearing, and that
the foregoing and annexed pages, numbered 205 through 275,
inclusive, comprise a true and correct transcription of
volume II of the proceedings in said cause.

I FURTHER CERTIFY that I am not related to or
employed by any of the parties or their counsel, nor am I
interested in the outcome of this action.

SWORN TO AND SUBSCRIBED by me this 1st day of
September, 1999.



DEBRA M. ARTER
Registered Diplomate Reporter

DEBRA M. ARTER
COMMISSION # CC 547771
EXPIRES MAY 08, 2000

Volume I

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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,)
)
Respondent.)
_____)

COPY

CASE NO.: 99-2581

* * * * *

TRANSCRIPT OF PROCEEDINGS
VOLUME I

* * * * *

The above and foregoing cause having come to be heard before DANIEL MANRY, Administrative Law Judge, on August 30, 1999, at the hour of 9:30 a.m., at the Brevard County Government Center, Building B, 2725 Fran Jamieson Way, in the City of Viera, County of Brevard, State of Florida, for the purpose of taking testimony in said cause.

REPORTED BY:
DEBRA M. ARTER
Registered Diplomate Reporter

ASSOCIATED COURT REPORTERS
105 South Narcissus Avenue - Suite 608
West Palm Beach, Florida 33041
(561) 655-2300

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A P P E A R A N C E S

FOR THE PETITIONER:

CLARENCE ROWE
(Pro se)

FOR THE RESPONDENT OLEANDER:

DAVID S. DEE, ESQUIRE
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FOR THE RESPONDENT DEP:

SCOTT A. GOORLAND, ESQUIRE
Assistant General Counsel
3900 Commonwealth Boulevard, MS-35
Tallahassee, Florida 32399-3000

* * * * *

1 I N D E X

2

3 PUBLIC COMMENT:

4

MARJORIE DERRICK 29

5

JAN MOODY 30

CRAIG BOCK 34

6

DOUGLAS SPAHR 54

TOM BERRINGER 59

7

OLEANDER'S WITNESSES: DIRECT CROSS REDIRECT RECROSS

8

RICHARD ZWOLAK 89 136 153

9

KENNARD F. KOSKY 155 177

10

RICHARD McCANN 184 218

11

AL LINERO 226 238

12

DEP'S WITNESSES:

13

NONE

14

15

PETITIONER'S WITNESSES:

16

JUANITA BARTON 269 272

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E X H I B I T S

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OLEANDER'S EXHIBITS:

ID EVIDENCE

7, 8, 12, 16, 17, 31, 34, 35, 36, 45, 46	132
14, 28, 29, 30, 1, 6, 9, 10, 13	176
15, 20-27, 37-44	217
2, 3, 5, 11, 19, 32	237

DEP'S EXHIBITS:

NONE

PETITIONER'S EXHIBITS:

1	180
3	252
7	261

P R O C E E D I N G S

1
2 JUDGE: This is the administrative
3 hearing in Clarence Rowe versus Oleander
4 Power Project, L.P., and Department of
5 Environmental Protection, Division of
6 Administrative Hearings Case Number
7 99-2581.

8 The issues for determination in this
9 proceeding are stated in the Petition for
10 Administrative Hearing. My name is Daniel
11 Manry, I'm the Administrative Law Judge
12 assigned by the Division of Administrative
13 Hearings to conduct this proceeding.

14 Counsel, state your appearance for the
15 record beginning with Oleander.

16 MR. DEE: Yes, sir. My name is David
17 Dee, I'm an attorney with the Law Firm of
18 Landers and Parsons, Tallahassee, Florida.
19 I'm here on behalf of Oleander Power Project,
20 the Applicant.

21 JUDGE: And the Department?

22 MR. GOORLAND: Scott Goorland for the
23 Department of Environmental Protection.

24 JUDGE: Mr. Rowe, are you represented by
25 Counsel?

1 MR. ROWE: No, sir.

2 JUDGE: Are you familiar with the procedure
3 followed in an administrative hearing?

4 MR. ROWE: No, sir, this is my first
5 opportunity, get my feet wet.

6 JUDGE: I'm going to take a few minutes
7 to give you a brief summary of what's going
8 to take place here today. If you have any
9 questions during that explanation, feel free
10 to ask.

11 Or at the conclusion or during the course
12 of the hearing, to the extent that I can answer
13 those questions without giving you legal advice,
14 I will.

15 I'm the Administrative Law Judge in the
16 case and I -- that means I make legal rules
17 and findings of fact in the case. I work for
18 the State, but I have nothing to do with the
19 Department of Environmental protection. I'm
20 an independent tribunal.

21 You are the Petitioner in this case.
22 And that means that you have the burden of
23 proof. You will present your case in chief
24 first consisting of witnesses and exhibits.
25 How many witnesses do you have?

1 MR. ROWE: I have one witness, but I
2 do have some questions and concern. I had
3 submitted to you a written request pertaining
4 to the citizens, I call them the people who
5 have a vested right that live here, pay taxes
6 and have an awful lot to say --

7 JUDGE: We'll get to that in a few
8 minutes, Mr. Rowe.

9 MR. ROWE: Okay.

10 JUDGE: How many exhibits do you have?

11 MR. ROWE: I have not tallied them.
12 However, I did give them all to Oleander
13 Power Plant and they did number them. I
14 don't know what the numbers are that they
15 have placed on them. But I gave them all
16 of the exhibits.

17 JUDGE: How many witnesses do you have,
18 Mr. Dee?

19 MR. DEE: Four.

20 JUDGE: How many exhibits?

21 MR. DEE: Forty-six.

22 JUDGE: Okay. You're going to call
23 your witness first, Mr. Rowe. You will
24 conduct direct examination of that witness.
25 Mr. Dee will have cross examination, you

1 will have Redirect and that will conclude
2 the examination of the witness.

3 You submit your exhibits during your
4 case in chief, and Mr. Dee has the right
5 to object to the admissibility of any of
6 those exhibits. I will rule on the
7 objections, if any. And then we'll proceed
8 in accordance with the ruling.

9 If I sustain the objection, the exhibit
10 will be retained in the record but not
11 submitted as evidence. If I overrule the
12 objection, that means the exhibit will be
13 admitted in evidence and relied upon as a
14 basis for findings of fact.

15 MR. DEE: Your Honor --

16 JUDGE: Yes.

17 MR. DEE: -- if I could object -- or
18 interrupt at this moment, with regard to
19 the permitting case as conducted by the
20 Department of Environmental Protection --

21 JUDGE: You have the burden of proof.

22 MR. DEE: -- I have the burden of
23 going forward initially.

24 JUDGE: You're correct, you're correct,
25 okay. So that changes the order of proof.

1 Let me ask the Department, are the interests
2 of Oleander and the Department sufficiently
3 aligned that Oleander can function as lead
4 counsel?

5 MR. GOORLAND: I'll be representing
6 the Department and if an issue comes up, you
7 know, that I'd like to ask a question to a
8 witness, I'm going to represent the Department
9 in that matter, if Oleander doesn't represent
10 the Department in that matter.

11 JUDGE: As a matter of procedure, I'm
12 going to address Oleander first.

13 MR. GOORLAND: That's fine, I'll speak
14 up if I need to.

15 JUDGE: I'll give you an opportunity
16 to on witnesses further direct if it's an
17 Oleander witness. If it's a witness by Mr.
18 Rowe, it would be further cross by the
19 Department.

20 MR. GOORLAND: Thank you.

21 JUDGE: Any objection to that?

22 MR. GOORLAND: No.

23 JUDGE: Okay. Just to finish the
24 explanation, Mr. Dee also has a right to
25 object to questions you ask of witnesses.

1 If he has an objection and I sustain the
2 objection, then that means you need to
3 ask the witness the next question. If I
4 overrule the objection, that means that
5 the witness can answer the question.

6 At the conclusion -- well, actually,
7 I'm changing the order here. Mr. Dee is
8 going to make a prima facie showing first.
9 At the conclusion of his case, then the
10 burden of going forward shifts to Mr.
11 Rowe.

12 Mr. Rowe, you then will present your
13 case in chief. And Mr. Dee then will have
14 an opportunity for rebuttal evidence.

15 MR. DEE: Yes, sir.

16 JUDGE: The same rules apply to Mr.,
17 when Mr. Oleander is presenting his -- I
18 mean when Mr. Dee is presenting Oleander's
19 case, you have the right to object to
20 questions of witnesses, you have the right
21 to object to the admissibility of exhibits.

22 And examination of witnesses by Mr.
23 Dee will be directed by Mr. Dee, cross by
24 you, Mr. Rowe, and redirect by Mr. Dee.
25 There may be further direct on those questions,

1 I mean on those witnesses by the Department.
2 Any questions?

3 MR. ROWER: Yes. I don't know if it's
4 a question, but -- oh, yes, it's a question.

5 I've been approached by a lot of the
6 citizens that have what I have referred to
7 as a vested right or Constitutional right in
8 reference to the freedom of speech. They
9 have asked to see if they would be given an
10 opportunity to bring their concerns to your
11 attention for consideration.

12 I did put that in writing to you. I
13 did not get a response to that concern.

14 Also, during a meeting on May the 13th,
15 both DEP attorneys did make it known that
16 the members of the community will be, would
17 be given an opportunity to speak before you
18 and that you would take their comments in
19 consideration.

20 In making this request, I would like
21 to --

22 JUDGE: Who said that?

23 MR. ROWE: The DEP attorney, as well
24 as Mr. -- what is his name, Mr. Halin, I
25 think his name is. I wasn't at -- I do

1 have the transcript.

2 JUDGE: Mr. Rowe, we have several
3 pending motions that I'm going to take up
4 in a few minutes. One of the pending
5 motions is your request to allow public
6 testimony filed August 6th. The second
7 is Oleander's Motion in Limine filed August
8 16th. And the third is Oleander's Motion
9 to Strike filed July 30, '99. All of those
10 we'll take up on pending motions.

11 Any witness scheduling problems or
12 other preliminary matters?

13 MR. DEE: No.

14 MR. ROWE: My witnesses have another
15 previous engagement. They will be here but
16 they will be much later. But since he's
17 going to be doing his thing first, they
18 will probably be here in time.

19 JUDGE: Okay. Mr. Rowe, have you had
20 an opportunity to review Mr. Dee's exhibits?

21 MR. ROWE: Not really.

22 JUDGE: Okay.

23 MR. ROWE: I've looked at some of them --

24 JUDGE: Well, you're not in a position
25 to state whether or not any of those exhibits

1 are uncontested?

2 MR. ROWE: No, sir. As a matter of
3 fact, I'd like to explain, as a matter of
4 record, I just received these documentation
5 as of Friday and due to the fact there was
6 a hurricane coming, we were making all
7 those preparations and doing what was
8 necessary, I have not had an opportunity
9 to review these things.

10 However, I don't have any problem in
11 holding this case up. As a matter of fact,
12 I think it might be important if we expedite
13 this case in order to, if the ruling is not
14 favorable for the citizens that we might
15 move this case into another arena.

16 JUDGE: Mr. Dee, have you had an
17 opportunity to review Mr. Rowe's exhibits?

18 MR. DEE: Yes, sir.

19 JUDGE: Are any of those exhibits
20 uncontested?

21 MR. DEE: No, sir.

22 JUDGE: Okay. On preliminary -- oh,
23 will there be a transcript?

24 MR. DEE: Yes, sir.

25 JUDGE: Okay.

1 MR. ROWE: Your Honor, I do have a
2 question to both you and Oleander Power
3 Plant. Is it okay if I ask someone to sit
4 here for me just to pass on some information
5 that I might need, someone to do some running
6 or something of that nature?

7 JUDGE: To assist you?

8 MR. ROWE: Yes.

9 JUDGE: Yes. Yes, except for the fact
10 that I'm not sure we have a chair for that
11 person. Someone has advised me that more
12 chairs are coming, but at this point they're
13 not here, yet.

14 MR. GOORLAND: Your Honor, as a
15 preliminary matter, I'd just like to file a
16 Notice of Appearance.

17 JUDGE: Oh, yes.

18 MR. GOORLAND: I'm substituting for
19 Douglas Beason.

20 JUDGE: Okay. Just for the record, Mr.
21 Goorland has just entered a Notice of
22 Appearance by Scott A. Goorland, Assistant
23 General Counsel for State of Florida
24 Department of Environmental Protection.

25 Okay, before we get opening statements,

1 Mr. Rowe --

2 MR. ROWE: Yes, sir.

3 JUDGE: -- the first pending motion is
4 your request to allow public testimony. Do
5 you wish to argue your Motion?

6 MR. ROWE: Yes. I make that request
7 on behalf of the citizens that have what I
8 would, what I want to call a vested right or
9 Constitutional right under freedom of speech
10 to voice their concern. These are people
11 that live in the community, they're registered
12 voters, they're taxpayers and they do have a
13 serious interest in the Oleander Power Plant
14 as well as other polluters in the community.
15 Therefore, they would like to voice their
16 concern.

17 Oleander did through I guess it's
18 process, and I'm getting my feet wet in
19 reference to it, has attempted to make
20 people aware that it would request
21 discovery through interrogatories,
22 videotapes and disks and things of a
23 computer nature and some people were
24 concerned about holding up their businesses
25 and things of that nature and, therefore,

1 it was kind of intimidating for people to
2 have to deal with that situation.

3 And based on the fact that on May the
4 13th, Mr. Doug Beasley, the attorney --

5 MR. GOORLAND: Beason.

6 MR. ROWE: -- Beason, the attorney for
7 DEP, and Mr., I think his name is Halpin,
8 the supervisor, I need to find that page,
9 has stated that the public would be given
10 an opportunity to speak before you and
11 that you would take those things in
12 consideration to the Secretary based on
13 their concerns.

14 I would like to make that request and
15 in making that request, I would ask that
16 the public comments of the citizens,
17 public comments be postponed until at
18 least tomorrow to get that word out because
19 these people have to work for a living,
20 they --

21 JUDGE: That Motion to Continue is
22 denied. Keep going.

23 MR. ROWE: Okay. Well, the main point,
24 I wanted to make sure that the people that
25 are not here today that were working would

1 be able to get their word in and be here
2 tomorrow. But I have to abide by whatever
3 your decision is.

4 JUDGE: Yes. This hearing isn't going
5 to be going on tomorrow. How many people
6 are you asking for public testimony from
7 today?

8 MR. ROWE: I am not -- I don't have
9 a head count or anything of that nature,
10 it's just that people have been calling me
11 in reference to that.

12 JUDGE: How many are here? I see at
13 least four, four hands. Okay.

14 MR. ROWE: There will probably be more
15 later.

16 JUDGE: Anything further, Mr. Rowe,
17 in support of your Motion?

18 MR. ROWE: No, like I said, I'm not a
19 lawyer and I don't practice it, but I like
20 to think that we, the people, that we here
21 do have a right to voice a concern about,
22 to approve those things that come into
23 our community because we're going to have
24 to live with it.

25 The people that are investing into

1 this community don't live here, probably
2 won't be living here and, therefore, my
3 main concern is in reference to the health
4 and the safety and the welfare of this
5 community and my children and my grandchildren
6 in reference to environmental impact.

7 JUDGE: Any response, Mr. Dee?

8 MR. DEE: Yes, Your Honor. On behalf
9 of Oleander, we had previously prepared and
10 filed a Motion in Limine and a response to
11 the request for public testimony.

12 As you will see in that response, there
13 are at least four major concerns that we have.
14 It is correct that under Chapter 120 you have
15 the right to allow public testimony when it
16 is appropriate. And it is clear from the
17 Statute that that is purely discretionary
18 on your part.

19 In this instance, we would respectfully
20 suggest that it is not appropriate to have
21 further public testimony. The Florida
22 Department of Environmental Protection has
23 already had two public hearings that were
24 noticed in the newspaper, that were held
25 at night at a site convenient to the public

1 close to where the project's going to be
2 located for the purposes of soliciting
3 public.

4 The first hearing was held in March,
5 it lasted for several hours. There was a
6 sizable crowd. I did not get a head count,
7 but the estimate would be probably 70 to
8 80 people or more.

9 The second hearing was held in May,
10 again, after notices and an opportunity for
11 the public to come in. The estimate that
12 I've heard is there were approximately 20
13 people at that meeting.

14 Both of those opportunities were
15 available to the public. A number of people
16 came and spoke. Mr. Rowe did not attend
17 the first meeting. He appeared briefly at
18 the second meeting and then left because he
19 felt that the notice had been inadequate.

20 Our concern is that the public has had
21 a fair and appropriate opportunity to comment
22 already and it is unnecessary to have, yet,
23 another opportunity in this proceeding.

24 Our concerns become more acute when we
25 start talking about people other than what

1 I would describe as the general public. The
2 first concern is that there were a group of
3 Petitioners that initially filed petitions
4 concerning the permit that's at issue in
5 this case. Those Petitioners voluntarily
6 dismissed their case before discovery could
7 be conducted.

8 Now, Mr. Rowe has indicated that they
9 were, quote, intimidated. I would suggest
10 to you that they merely received standard
11 interrogatories asking them to explain the
12 basis for their contentions and also to
13 produce the documents that supported their
14 contentions.

15 They dismissed. They should not now
16 be allowed to come to this hearing and, in
17 effect, ambush Oleander with issues and
18 testimony that was not previously disclosed
19 through discovery.

20 We've had no opportunity to take the
21 depositions of those individuals or otherwise
22 to learn the basis for their claims.

23 The third set of potential public
24 witnesses that is of concern to us would be
25 those people that would come in and proffer

1 expert testimony under the guise of public
2 comment. We understand that general lay
3 members of the public sometimes are allowed
4 to come in and testify at these proceedings.
5 But we do not want experts coming in and
6 testifying, again, when we've had no
7 opportunity for discovery.

8 We've sent interrogatories to Mr. Rowe,
9 he's indicated that he has no expert witnesses.
10 We've taken his deposition, he reconfirmed
11 that he had no expert witnesses.

12 Given the fact that there has been no
13 expert testimony examined through discovery,
14 we would hate to have Oleander ambushed in
15 this hearing by members of the public or
16 people coming in under the pretense that
17 they're members of the public and presenting
18 expert opinion testimony.

19 The final concern is that Mr. Rowe has,
20 to use his words from his deposition, tried
21 to create a campaign in this instance. He
22 has gone out and solicited members of the
23 public to come testify. He has not
24 identified any of them to us with the
25 exception, I guess, of Ms. Juanita Burton,

1 or Barton.

2 Other members of the public, again,
3 we've had no opportunity for discovery.
4 We don't know who they were or they are or
5 what they would say. —

6 Given the significance of this case
7 to my client, we just don't feel that it's
8 appropriate for them to be ambushed in this
9 fashion with public testimony. This is a
10 major project, it offers significant benefits
11 to the residents of this community. It's
12 been carefully reviewed by the Department
13 of Environmental Protection and recommended
14 for approval.

15 We feel that the client in this case,
16 Oleander, is entitled to a fair hearing.
17 It would not be fair to allow the public
18 to come in and bushwhack Oleander at this
19 point with undisclosed facts and allegations.

20 JUDGE: Who are the individuals, members
21 of the public, who are here to comment today?

22 Okay, Madame, state your name for the
23 record and spell --

24 MS. DERRICK: Marjorie Derrick.

25 JUDGE: -- Spell each name.

1 MS. DERRICK: M A R J O R I E,
2 D E R R I C K.

3 JUDGE: And your name?

4 MS. MOODY: Jan Moody, M O O D Y.

5 JUDGE: J A N? _ _

6 MS. MOODY: Uh-huh.

7 JUDGE: Sir?

8 MR. BOCK: Craig Bock, C R A I G, last
9 name B O C K.

10 MR. SPAHR: Douglas Spahr, S P A H R.

11 JUDGE: S P A --

12 MR. SPAHR: S P A H R.

13 MR. BOCK: And I know at least two
14 others that are coming, sir, just running
15 a little late.

16 MR. SPAHR: There's one more, Your
17 Honor.

18 JUDGE: Oh, yes.

19 MR. BERRINGER: Tom Berringer, just
20 like the movie actor.

21 JUDGE: Well, I'm not --

22 MR. BERRINGER: Spelled a little bit
23 different.

24 JUDGE: How do you spell your last
25 name?

1 MR. BERRINGER: B E R R I N G E R.

2 MR. BOCK: Sir, do you know where I
3 could get some more chairs to bring in?
4 Would that bother you, to bring more in?

5 JUDGE: No.

6 MR. SPAHR: We've made two requests.
7 Maybe we need to make a third.

8 JUDGE: Ms. Derrick, did you make --
9 did you participate in either of previous
10 hearings?

11 MS. DERRICK: Yes, sir.

12 JUDGE: Ms. Moody, did you?

13 MS. MOODY: Yes, I did, but I have not
14 ever signed a petition.

15 JUDGE: Mr. Bock, did you?

16 MR. BOCK: Yes, sir, I did.

17 JUDGE: Mr. Spahr?

18 MR. SPAHR: Yes.

19 JUDGE: And Mr. Berringer?

20 MR. BERRINGER: Yes, sir.

21 JUDGE: Okay. And Ms. Derrick, Ms. Moody,
22 Messrs. Bock, Spahr and Berringer, have any
23 of you ever been a litigant in a previous
24 administrative hearing involving this matter?

25 MR. BOCK: No, sir.

1 MS. MOODY: No.

2 MR. SPAHR: Yes, yeah, we were Petitioner --

3 MR. BOCK: Oh, excuse me, in other words,
4 did we file?

5 JUDGE: Yeah, were you a party to a case? --

6 MR. BOCK: Yes, sir.

7 JUDGE: Okay. Ms. Derrick, are you going
8 to say anything different today than what you
9 said in previous public --

10 MS. DERRICK: Yes, I've had --

11 JUDGE: -- hearings -- okay, we have a
12 Court Reporter here today and we're trying
13 to make a public record.

14 MS. DERRICK: Uh-huh.

15 JUDGE: So throughout the course of
16 the day, I'm going to instruct everyone to
17 talk one at a time. So if I'm asking you
18 a question, let me finish the question
19 before you start your answer. And I'll
20 let you finish your response before I ask
21 the --

22 MS. DERRICK: I had the one-sentence
23 thing to say is all.

24 JUDGE: -- and I'll let you finish
25 your response before I ask the next question.

1 Did you get that?

2 COURT REPORTER: Thank you, I did, yes.

3 JUDGE: Okay. So you are going to say
4 something different than what you said --

5 MS. DERRICK: Definitely, yes, sir.

6 JUDGE: -- earlier. Ms. Derrick, is
7 there something that you don't understand
8 about my instruction to let me finish the
9 question before you start your answer?

10 MS. DERRICK: No.

11 JUDGE: Okay. Ms. Moody, are you
12 going to say anything different than what
13 you said at your earlier public hearing
14 appearance?

15 MS. MOODY: Yes.

16 JUDGE: Okay. Mr. Bock, same question.

17 MR. BOCK: Yes, sir.

18 JUDGE: Mr. Spahr?

19 MR. SPAHR: Yes, sir.

20 JUDGE: And Mr. Berringer?

21 MR. BERRINGER: Yes, sir.

22 JUDGE: Ms. Derrick, how long would
23 your comments take?

24 MS. DERRICK: About 30 seconds.

25 JUDGE: And Ms. Moody?

1 MS. MOODY: Approximately 10 minutes.

2 JUDGE: And Mr. Bock?

3 MR. BOCK: Probably 10 to 15 minutes,

4 sir.

5 JUDGE: And Mr. Spahr?

6 MR. SPAHR: Ten minutes or less.

7 JUDGE: Mr. Berringer?

8 MR. BERRINGER: Approximately 10 minutes,

9 sir.

10 JUDGE: Anything further from either of
11 the parties?

12 MR. DEE: Yes, sir.

13 JUDGE: Go ahead.

14 MR. DEE: As you've heard, all of these
15 witnesses testified before. Two of the
16 witnesses were Petitioners before. They
17 now all claim that they're going to say new
18 things. It is those -- those new things
19 are precisely what I'm concerned about.

20 They are new issues, presumably, that
21 we have not previously had any notice of
22 or any opportunity for discovery and, thus,
23 no means to address or prepare for. That
24 is why we continue to object to public
25 testimony by these witnesses.

1 JUDGE: Mr. Goorland, do you have
2 anything to add on behalf of the Department?

3 MR. GOORLAND: No, sir, we don't object
4 to public testimony.

5 — JUDGE: Okay. Subject to a condition
6 that I'm going to express in just a few
7 minutes, the request to allow public comment
8 is granted. The Motion in Limine is denied.

9 I'm going to start with Ms. Derrick,
10 proceed to Ms. Moody, Mr. Bock, Mr. Spahr
11 and Mr. Berringer. And to the extent that
12 the public comments are redundant, then
13 I'm going to stop it as cumulative.

14 So if -- if you're not going to say
15 anything different than what the previous
16 speaker said, then your public comment
17 would be limited to adopting that speaker's
18 comments.

19 And any comments that you do make
20 will be limited to comments that are
21 different and not cumulative of the
22 previous speakers.

23 Ms. Derrick.

24 MS. DERRICK: I just wanted to make
25 a comment on this inadequate notice of

1 or publication about notice of the May
2 meeting --

3 MR. DEE: Your Honor --

4 JUDGE: Just a minute. Mr. Dee?

5 MR. DEE: We're starting public testimony
6 now?

7 JUDGE: Yes.

8 MR. DEE: All right, could I pose a
9 standing objection to any testimony that's
10 based -- since they're not going to be --

11 JUDGE: This isn't testimony.

12 MR. DEE: This is just public comment.

13 JUDGE: None of these people are under
14 oath.

15 MR. DEE: All right, sir. I understand.

16 JUDGE: Go ahead, Ms. Derrick.

17 MS. DERRICK: Okay, concerning inadequate
18 notice about the May meeting that caused a
19 number of residents actually to leave. I
20 talked the next day to a County Commissioner's
21 office, I forgot whether it was Truman
22 Scarborough or Sue Carlson, and they said
23 they had no idea that meeting was taking place.

24 I just wanted to put that out.

25 JUDGE: Okay, thank you. Ms. Moody.

1 MS. MOODY: I just have a couple of
2 things to say, sir.

3 JUDGE: State your name for the record.

4 MS. MOODY: My name is Jan Moody,
5 M O O D Y. I live at 2130 Winston Drive
6 in Cocoa.

7 And I have been a resident there for
8 21 years and we have two children and we
9 moved here specifically for the rural
10 area and the wildlife out there.

11 Throughout the years, my children and
12 I and my husband have loved the wildlife.
13 And in fact, I dug through some photographs,
14 this is my son and what you see here are
15 white ibises, this is on our street.

16 And I copied out a map, and in this
17 yellow area is the plant, the power plant,
18 and the two other areas is the big fishing
19 hole, people have been going there for years.

20 And all along these red lines are
21 where we have spotted the endangered wood
22 stork. This photograph right here was taken
23 just about one mile from the area. And in
24 this photograph, which is a photograph I
25 took, is a photograph of the endangered

1 species, the wood stork. There's eight of
2 them in here and there's little babies that
3 are in here and the babies are what is in
4 danger, especially.

5 I have a collection of other -- here
6 are some baby fledglings. These are all
7 wood storks all along this area.

8 I found out on the web site that
9 Oleander Plant has stated that they have
10 taken -- they had looked at endangered
11 species in this area and they found none,
12 there was no habitat. I beg to differ with
13 that because I know that's not true. There
14 is a lot of endangered, threatened and
15 special concern birds and animals like
16 the alligator, turtle in these lakes,
17 there's wood storks all along in there.
18 This is where they nest, this is where
19 they have their babies.

20 And in the last 20 years there has
21 only been 15 years where they've had babies.
22 I don't think a substantial type of study
23 has ever been done on this property, any
24 type of an environmental impact statement
25 or a study has been done.

1 I know that if it had, they would
2 have found all these birds, the hawk, the
3 eagle, all of them are on this property.
4 They're in our property. And they'll be
5 — flying over the five stacks that they
6 have and that -- because the wood stork
7 is, flows with the up drafts and especially
8 heated ones, they would get into this and
9 possibly -- probably be incinerated with
10 the 1,100 degrees.

11 I would ask that some type of a
12 environmental -- a good, unbiased environmental
13 study, impact study be done. Because I do
14 know that we have all these in our area.
15 And these are endangered and threatened
16 species, especially the wood stork, the
17 woodpecker and the sandhill crane, those
18 are three species that are on the endangered
19 list.

20 And I specifically point out these
21 because -- with the wood storks years ago
22 in the -- this sounds kind of silly now, but
23 in the fifth grade, this is my son's report,
24 this was on the wood stork and he got an
25 award for it. And we have been following

1 these wood storks all along throughout the
2 years and we were very surprised because
3 this is the first time that they left the
4 cork screw sanctuary near Fort Meyers and
5 they headed up--and they happen to live in
6 our area.

7 And as I said before, all these red
8 areas are where we have spotted them. And
9 I know there's more in there. But they fly
10 over this area, too. But they're on this
11 property, too. We have followed these
12 wood storks for years and I would hate to
13 see something happen to a lot of our species.
14 They're beautiful.

15 This is what happens. And this is the
16 area they're coming to to build in and this
17 is the reason we moved out there. We're
18 teaching our children to, please to take
19 care of the wildlife and we've done that
20 all throughout their lives. We moved out
21 there specifically for this reason.

22 I did not get any type of a brochure
23 or anything of a mailing about this Oleander
24 Plant. I had no idea it was even going to
25 be in -- that it was even going to be around

1 the area until I saw it in the newspaper.

2 This is the reason why we moved out
3 here. We've invested a lot of, we've invested
4 a lot of money. We've put in thousands of
5 dollars of plants and plant life. We've
6 protected the wildlife. We've done all this
7 for 21 years. We've kept our eye on the
8 zoning. And we knew that everything was
9 residential, agricultural or industrial.

10 And with industrial, I'll say light
11 industrial because never in 100 years
12 could you ever convince me that a huge
13 850 megawatt plant, power plant that has
14 a Title V permit to spew out four million
15 pounds of pollutants a year is light
16 industry. We don't understand how that
17 could ever be classified as such.

18 And I thank you very much.

19 JUDGE: Okay, thank you. Mr. Bock?

20 MR. BOCK: Yes, sir, is this chair
21 being used?

22 JUDGE: No, you can sit there.

23 MR. BOCK: Your Honor, my name is
24 Craig Bock. My interest in this, I live
25 on the 3.2 kilometer fallout area with my

1 home being on Lake Poinsett, and I know
2 we need to make this pertinent --

3 JUDGE: Just a minute, let me interrupt
4 you. By statute, Mr. Dee, Mr. Goorland, Mr.
5 Rowe, do any of you wish to cross examine
6 the previous person?

7 MR. ROWE: No, Your Honor.

8 JUDGE: Do you have a copy of the
9 Statute handy, Mr. Dee?

10 MR. DEE: Yes, sir, I do, that's what
11 I was looking at.

12 JUDGE: Okay, Mr. Goorland, do you?

13 MR. GOORLAND: No.

14 JUDGE: Mr. Dee, do you?

15 MR. ROWE: Is all that the Statute?

16 MR. DEE: No, sir, we'll address those
17 issues during our case in chief.

18 JUDGE: I still would like to address
19 that during your case in chief.

20 MR. DEE: Yes, sir.

21 JUDGE: Mr. Bock, you can proceed.

22 MR. BOCK: Yes, sir, my name is Craig
23 Bock and the reason for my interest is I
24 live on a 3.2 kilometer fallout area, the
25 actual study area of the fallout from this

1 plant. The maximum particulate in an
2 isograph or whatever it's called, sir, I'm
3 no professional, certainly, there's an X
4 on my street showing the maximum particulate.

5 My daughter has asthma. Through study, —
6 we see no other state that we can find on
7 the Internet that would allow a power plant
8 and light industrial, let alone one of this
9 size, through. Through our research, we
10 have found out that the initial 2,000 hours,
11 and our belief was it was going to take this
12 power plant over the 100 tons of VOCs which
13 should have provided on-site monitoring.
14 It was taken down to 100,000 after that.

15 A letter from DEP states that at any
16 time they could request more hours of oil
17 burning.

18 Here we are with what we feel is
19 already an unfair, you know, amount of
20 pollution from power plants in our area
21 because we have two already in our area
22 that the County Commission is working on
23 trying to change to gas power plants and
24 here we're going to allow another one
25 that has a tremendous amount of potential

1 oil burning.

2 This is my problem. I live on a
3 dream lake with a daughter with asthma.
4 I work for Florida Power and Light, but
5 I'm not representing them, I'm only
6 representing my own interest. I'm a
7 distribution designer. And throughout
8 this ordeal I was representing Florida
9 Power and Light erroneously by their
10 attorney. It has been a difficult thing.
11 They got plenty of budget to work this
12 through.

13 We requested pre site monitoring.
14 I know that a letter from DEP stated that
15 for good corporate citizenship they would
16 put a monitor in our area. They refused
17 to do that, though they stated they're
18 good corporate citizens.

19 The truck traffic would be tremendous
20 and we have two retirement communities
21 right at that corner. And I believe it's
22 700 and something trucks to refill the,
23 I believe it's 5.6 million gallons, either
24 5.6 or 5.2, I think there are two 2.6
25 million gallons of oil.

1 Through our research, we have found
2 out, it grows a mildew, I believe this
3 would be professional hearsay since I'm
4 not a professional, we heard it would be
5 more reasonable to burn it than to treat
6 it for this fungicide, quite an expensive
7 process. So we have a great concern, also,
8 you know, when this project was introduced
9 they said it would not be seen. They showed
10 pictures where you could barely see it.

11 Then they said in their stipulated
12 agreement with Brevard County, which the
13 attorneys in that situations said they
14 couldn't do that during the moratorium
15 but it was voted on by the Commissioners,
16 stated that upon maturity 50 percent of
17 this plant would not be seen. A lot more
18 from what they had said.

19 Then in the stipulated agreement,
20 now it's 80 percent within five years.
21 So we did get some concession on that.

22 But let me say in their fact book,
23 they said they based their professional
24 reputations on -- and believe me, this
25 group has hired some very good professionals,

1 I admire all of them for their knowledge,
2 they're very good, but they stated there
3 would be no opacity, you would not even
4 be able to see this. Now, all of a
5 sudden, in the agreement upon start-up
6 it would be 20 percent and upon running
7 can be 10 percent.

8 They also gave setbacks in the fact
9 book of anywhere between 250 and 750 feet,
10 I believe, sir, I'm going by memory. And
11 with the agreement, it was 25 feet to the
12 north, the lot line, and much closer on
13 the sides. So we know that we were told
14 erroneous facts from the beginning.

15 Also, this is being built upon a
16 piece of property that is considered
17 functional wetlands on it, but Brevard
18 County code and industry should not be
19 able to develop on this property.

20 Basically, the citizens have gotten
21 together, we did our best to collect
22 moneys, we had Mr. John Harris from
23 Titusville represent us to the best of
24 his ability. I apologize for dropping
25 out of the, of the challenge, but let

1 me say this, Judge, I'm generally not
2 a coward.

3 But I became afraid when Mr. Dee
4 sent me some paperwork, and he can shake
5 his head but I did congratulate him and
6 the County Attorney's Office for scaring
7 me out because it talked about getting
8 a hard drive from your home. And that
9 may be very standard language, but when
10 you're told that it goes from just the
11 day of being able to speak before a judge
12 to a three-day court case and then you're
13 told they may even come get the hard drive
14 of your home and they're already stating
15 the records of a major company who I know
16 is not going to come to my aid, so it's
17 going to be my home, my money, my attorney
18 and my life, I did it because I was a coward
19 in that situation, I dropped out. I don't
20 say that very proudly.

21 There have been facts throughout, sir,
22 that have been not been true. There has
23 been considerable contributions as Mr.
24 Wolfinger says, they're good corporate
25 citizens and that's how they act upon that.

1 But certainly, nothing that the average
2 citizen can, can come against.

3 As you see today, most of the seats
4 are filled with many of their specialists.

5 And who are we?

6 I do know that Doug Spahr has written
7 a letter to DEP. I believe it still has
8 gone unanswered as of the, Mr. Holliday's,
9 the meteorologist's, model. As you know,
10 with models, sir, it depends on the
11 information you put in. But because these
12 stacks are so short, because there's a
13 60-foot limit on this light industrial area
14 for zoning, this plant is actually larger
15 megawatt wise than the Florida Power Plant
16 on U.S. 1, which is on a small 37 acres.

17 But the height is 60 feet on these
18 stacks and I believe it's 100 (sic) and
19 either 12 degrees or 1,116 degrees Fahrenheit
20 that this gas has to try and exit out to try
21 and get the rise because the stacks are so
22 short.

23 And we also believe that at times with
24 much humidity and like yesterday, you can
25 see the smoke push down quickly. Also, it's

1 at a velocity at around 72 miles an hour, I
2 believe. They have to do this. And it
3 uses two million gallons of water a day.
4 We're concerned, we went to the City of
5 Cocoa, they came with their attorney and
6 their representation, we were mirrored and
7 well challenged on each end. But two
8 million gallons of water a day is not minor
9 thing.

10 The citizens of Cocoa right now do not
11 have all reclaimed water and they plan on
12 using -- I believe Cocoa has in excess of
13 about 350,000 gallons per day, and as per
14 the DEP letter, they can use up to 1.9
15 million. They can use 8.6 in Oleander --
16 I believe, that and more. It's probably
17 within 100 yards to the ramp of I-95 to
18 the truck traffic they're going to have.

19 And, sir, I don't know if I've done
20 a well job of representing this, but I
21 feel if we had representation we could
22 afford, what they have, this certainly
23 could be stopped.

24 The functional wetlands, through the
25 meteorologist, I'm not a professional to

1 challenge but we've had some, you know,
2 professional people, no PE engineers, look
3 at it and it don't seem to add up. The
4 letters we have from DEP that Marlene
5 Waters is bringing, I believe, and she's
6 running a little late, but she has copies
7 of those letters for to you substantiate
8 those facts. Their fact book, no doubt,
9 even a Commissioner stated, they were less,
10 they seemed to be less than truthful at
11 the time. I believe that was County
12 Commissioner Truman Scarborough's words
13 at the time, maybe to a lesser degree.

14 This power's going to go outside
15 Brevard, we don't need it. Today we're
16 looking at just the perimeter. They put
17 it in what we consider to be an economically
18 depressed area already. Certainly, we have
19 tourists turn off 1-95 that go past another
20 power plant, I believe.

21 This has serious ramifications. I
22 know my home will be going up for sale. Some
23 studies have shown some companies pay a \$2
24 Million bond for loss of homes. They did
25 not render to us, the people, they gave it

1 to consideration Sue Carlson.

2 The other Commissioners stated they
3 didn't receive it. Said there was no
4 property value loss. But I will say that
5 the gentleman that was going to buy the
6 lot next door to me was very concerned.
7 Once a power plant goes there, I have to
8 have -- my realtor by law has to tell the
9 purchaser that a power plant is being built
10 within that vicinity. So there's no doubt
11 that my dream home, which was put on the
12 market for \$269,000 maybe a year ago, but
13 that dream home, there is no doubt that
14 that will depreciate greatly.

15 This will be a tragic loss for me, not
16 only for my daughter's health but for my
17 property. And the wetlands will be dredged
18 on and by Brevard County regulation they
19 should not be able to. And the fact they
20 have not been forthright and truthful in
21 all their facts in their fact book that
22 they said they staked their professional
23 recommendations on.

24 I am very pleased that Clarence Rowe
25 has had the courage to continue this. And

1 I'm pleased to speak before you all in the
2 legal world. I did not have the strength
3 that Clarence Rowe has, I admire him greatly
4 for continuing this. I didn't think I could
5 take the three-day ordeal and the possibility
6 of having my hard drive taken and already
7 seeing what has been falsely recommended by --
8 any gain that could be played to belittle me
9 and to challenge me in my personal life, it's
10 been tough.

11 JUDGE: Thank you.

12 MR. DEE: Your Honor, could I just ask
13 just a few questions?

14 JUDGE: Well, The statute provides that
15 the threshold test before you get to that
16 point, Mr. Dee, is whether or not the Agency
17 proposes to consider the material.

18 MR. DEE: That's correct, yes, sir.

19 MR. GOORLAND: Can we have a few seconds
20 on that?

21 JUDGE: Sure.

22 MR. BOCK: Sir, I know there are two
23 others that are coming. I don't know why
24 they're so late. I had trouble finding
25 this room, it's not marked well.

1 MR. DEE: Your Honor, in this instance,
2 I believe you're sitting in the chair of
3 the Agency head on an interim basis, and I
4 think the initial decision is yours as to
5 whether you can, intend to consider the
6 material.

7 JUDGE: Mr. Goorland?

8 MR. GOORLAND: At this time we've taken
9 into account much of the public testimony
10 that was already previously given. And we
11 have made our position known on the permit
12 and we're going to stand by that.

13 JUDGE: Okay, so the answer to the
14 question is no?

15 MR. GOORLAND: Right.

16 JUDGE: All right.

17 MR. DEE: For the purposes of making
18 sure that the record is complete, could I
19 ask just a few quick questions?

20 JUDGE: Mr. Dee, while you were
21 conferring -- Mr. Goorland, Mr. Dee has made
22 the argument that the term "Agency" in Section
23 120.57, (1) (B) means the Administrative Law
24 Judge sitting in the stead of the Agency head
25 in Recommended Order cases. That's his argument.

1 I don't know if you heard that or not.

2 MR. GOORLAND: I did not hear that.

3 JUDGE: Do you have a position on that?

4 MR. GOORLAND: I have no objection to that.

5 JUDGE: Well, the statutory definition of
6 agency is broad enough to include that
7 interpretation. However, it's not clear that --

8 MR. GOORLAND: Are you asking whether or
9 not the testimony can be taken into account --

10 MR. DEE: That's the issue.

11 MR. GOORLAND: -- in the record?

12 JUDGE: The issue -- first of all, it's
13 not testimony, the Statute doesn't provide for
14 testimony. The Statute provides for public
15 comment.

16 MR. GOORLAND: Right. I'll have no
17 objection to doing so.

18 JUDGE: Well, I think that -- I disagree
19 with that interpretation. The Agency here
20 in this case is, has heard the public comment
21 before --

22 MR. DEE: Yes, sir.

23 JUDGE: -- is in a position to know
24 whether or not this public comment is cumulative
25 of previous comments, whether or not anything

1 new is being presented that the Agency hasn't
2 already considered and will be addressed in
3 the case in chief.

4 The only determination I can make of
5 whether or not these comments are cumulative
6 is when I hear it here today. If I hear
7 comment that's cumulative of previous comment,
8 then I can make that determination.

9 But the only purpose for me allowing
10 public comment today is to allow the public
11 an opportunity to make comments on this issue
12 when they have not had a previous comment --
13 opportunity to make comment; or if they have
14 had a previous opportunity to make comment,
15 then to make comment other than that which
16 they have already made in their earlier
17 opportunities, that's the sole scope for
18 which I've allowed, or granted the Motion
19 and denied your Motion in Limine.

20 MR. DEE: Yes, sir, and I guess -- the
21 objection I had started to interpose a few
22 moments ago was that we would like to have
23 a standing objection to any hearsay testimony
24 to any expert opinion testimony that is
25 rendered by people who have not demonstrated

1 to possess the necessary expertise to give
2 that opinion testimony.

3 And thirdly, we would object to any
4 speculative testimony.

5 JUDGE: - Okay.--- At such time as a member
6 of the public is sworn, then you can make that
7 objection. It's moot because there's no
8 testimony being given.

9 MR. DEE: Just for the purposes of
10 preserving the record in this instance, could
11 I ask Mr. Bock to confirm that he does not
12 claim to be an expert with regard to the
13 issues that he's just described?

14 JUDGE: You can ask him. I heard Mr.
15 Bock expressly say that he's not. But if
16 you want to -- in an abundance of caution,
17 if you want to ask that question.

18 THE WITNESS: I have no problem
19 repeating that for the record, if that's
20 okay with you, Judge.

21 JUDGE: Okay.

22 MR. BOCK: I am not a professional nor
23 do I speak any of these facts as a professional.
24 Many of them are done by the professionals at
25 DEP and the professionals at your company

1 that I repeated. And again, I can substantiate
2 by bringing in this information, I have it
3 with me today.

4 MR. DEE: But you claim no expertise
5 with regard to the issues that you've just
6 discussed.

7 MR. BOCK: Yes, sir, that's correct.

8 MR. DEE: That's all I need.

9 MR. BOCK: I guess our major concerns,
10 Judge, before I sit down and again, I
11 appreciate this time, again, it's a time
12 for a coward and I appreciate that, sir.
13 I say that humbly.

14 We don't feel, and I say we, many of
15 us people have discussed, we've been very
16 well treated by Mr. Allender, he has
17 answered questions. We don't feel DEP is
18 an agency that's protecting us, we feel
19 it's business as usual. We don't feel
20 Brevard County has protected us. Our
21 attorney has, John Harris has said going
22 into the moratorium it's illegal. We are
23 the people against all odds with no way
24 to win as we should.

25 Now, these facts which we stated are

1 correct, we feel DEP is here to permit,
2 we believe we have a disproportionate
3 amount already. And in a functional
4 wetland issue by Brevard County code says
5 they can't build there, from my
6 understanding, not as an expert, yes,
7 sir.

8 JUDGE: All right.

9 MR. GOORLAND: Your Honor, if I may,
10 when I stated my position before, I want
11 to caveat that by saying I was not at, or
12 present at the public hearings, so I could
13 not affirmatively distinguish between what
14 was stated there and anything new that is
15 being stated here. However, I still hold
16 our position that I stated before.

17 JUDGE: But you've conferred with
18 representatives of the Agency --

19 MR. GOORLAND: Yes, I have.

20 JUDGE: -- who have that knowledge.

21 MR. GOORLAND: I believe they are here,
22 there are people here who did have that
23 knowledge that could distinguish the
24 difference.

25 JUDGE: Okay.

1 MR. BOCK: Sir, one last thing, what
2 surprised us was when, we thought that DEP
3 worked for we, the people, and we thought
4 we employed them. But we have found out
5 when we challenged this the response was
6 done by David Dee and his crew. It was
7 no longer we, the people, with DEP, it was
8 the Oleander Power Project versus us.

9 And it was very much a surprise. I've
10 always been a person that's been strong in
11 believing that the people can win when it's
12 right. I've lost that opinion, sir. And
13 I might just say that it is intimidating
14 and it may be in your legal world a very
15 normal thing to get a package like that,
16 but to me it was.

17 I'm not a coward, I'm a fighter, and
18 I cowarded out because of that. There was
19 not really much DEP -- you could tell they
20 were carrying it for DEP and I thought DEP
21 worked for DEP. Thank you, Your Honor.

22 JUDGE: Thank you. Mr. Spahr.

23 MR. DEE: Your Honor, for the purposes
24 of the record, there were some accusations
25 at me directly and I'd like to point out

1 that I on behalf of Oleander sent one set
2 of interrogatories and one Request to Produce
3 to the Petitioners in this case. They were
4 represented by counsel.

5 JUDGE: When you say the Petitioners
6 in this case --

7 MR. DEE: Well, the Petitioners in the
8 original proceedings, that would include Mr.
9 Bock, Mr. Spahr.

10 JUDGE: Okay.

11 MR. DEE: They were represented by
12 counsel, as you heard, Mr. John Harris. No
13 objection to any of those discovery requests
14 was ever posed by Counsel for Mr. Bock or Mr.
15 Spahr. I've had no telephone conversations
16 with them, no ex parte communications.

17 So I do strongly object for the record
18 to any insinuation that I intimidated or
19 threatened or otherwise abused these people.

20 JUDGE: Mr. Spahr. Anything different
21 than --

22 MR. ROWE: Mr. -- Your Honor, like I
23 said, I'm not a lawyer, but I'd like to say
24 something and I don't know if this is the
25 appropriate time to say it. But in response

1 to the people that are speaking here, I, too,
2 felt that that was in the form of intimidation.
3 We're not lawyers, we're not professionals --

4 JUDGE: Mr. Rowe --

5 MR. ROWE: Yes, sir. --

6 JUDGE: -- this interest your opportunity
7 for public comment.

8 MR. ROWE: Go right ahead, sir.

9 JUDGE: Mr. Spahr, anything different
10 other than what has already been said by Mr.
11 Bock?

12 MR. SPAHR: Yes, sir. Ms. Derrick and
13 Ms. Moody, I got different substance than
14 Mr. Bock.

15 JUDGE: Go ahead, state your name for
16 the record.

17 MR. SPAHR: My name is Douglas Spahr,
18 Cocoa, Florida, and I'm representing myself
19 here today and I don't purport to be an
20 air pollution expert. But I am a citizen
21 who did take the trouble to get the entire
22 Intent to Issue package, including such
23 things as the technical evaluation, preliminary
24 determination, so on and so forth.

25 And in one area of Florida here we do

1 have some Class One areas and the National
2 Park Service has permitting responsibility
3 for that area. And I did get a copy of
4 their permit application guidance for new
5 - air pollution sources. And one thing that
6 interests me here, they're making a statement
7 here, says all assumptions for the analysis
8 should be explicitly stated with sufficient
9 information to be furnished to the National
10 Park Service (inaudible).

11 I went through it. They have a page
12 here, but it's all the significant happenings
13 with regard to this case. You know, letters
14 back and forth and so on and so forth. And
15 I was kind of surprised to see in there, I
16 saw no formal request from DEP or data to
17 do what the National Park Service thinks is
18 fundamental, duplicate their analysis.

19 Because this whole permit thing is
20 predicated on this, on this analysis and
21 they're using, you know, data from the
22 Orlando Airport estimates, the DEP wavered
23 requirement to do pre-construction watering,
24 so we're tied down to the healthy air we
25 believe is on the validity of a computer

1 simulation.

2 I believe Mr. Rowe, he petitioned to
3 ask for the power plant's procedures for
4 validating and maintaining a computer
5 simulation. I'm not making this statement
6 as an expert witness thing, but I work for
7 a contractor where simulations were used
8 for aircraft and we were required to have
9 it and the Government came in and saw we
10 had an audited and verified plan for the
11 validation and verification of our simulated
12 software.

13 I'm not casting any aspersions or
14 alluding (Inaudible) or sites and suddenly
15 you have a model that doesn't do what it
16 was purported to do in the first place.
17 So maybe they did this but seems like the
18 official record would say the DEP asked for
19 this data. You read this technical thing,
20 it says no way did they have it. The
21 National Park Service thinks that's
22 fundamental and seems like it's good
23 practice with a simulation thing.

24 I really think it ought to be done
25 in this case. They ought to get that data,

1 they ought to duplicate the ambient air
2 flow analysis to some reasonable, you know,
3 percentage. Because I'm breathing this air
4 here and I'd really like to have a higher
5 confidence in this ambient air quality --
6 analysis. Thank you.

7 JUDGE: Just a minute. Mr. Goorland,
8 same question.

9 MR. GOORLAND: No questions. However,
10 I'd like to --

11 JUDGE: No, my question to you is does
12 he -- it's the same question after every
13 public comment, by --

14 MR. GOORLAND: Okay.

15 JUDGE: -- statute does the Agency
16 propose to consider this material?

17 MR. GOORLAND: What I'd like to state,
18 I've clarified the matter with some of my
19 folks, and it will be the same answer for
20 each one of the public testimony.

21 JUDGE: Okay.

22 MR. GOORLAND: So you won't have to
23 ask me.

24 JUDGE: You speak up if anything changes.

25 MR. GOORLAND: I will. What we've done

1 is we've taken into account from previous
2 testimony any of the matters that are being
3 brought up that are within our permitting
4 jurisdiction. Now, there are matters that
5 are being brought up that are not within our
6 jurisdiction, that has not been taken into
7 account.

8 JUDGE: And for the record, so that
9 everyone understands, when you say within
10 your jurisdiction, you mean within the
11 jurisdiction of this hearing --

12 MR. GOORLAND: Within --

13 JUDGE: -- since this is proposed
14 Agency action of your Agency. Therefore,
15 if you don't have jurisdiction over it, I
16 don't have jurisdiction.

17 MR. GOORLAND: Right.

18 JUDGE: Okay.

19 MR. GOORLAND: And that pretty much
20 concludes my comment. We've taken those
21 into account in our, our permitting actions
22 previously.

23 JUDGE: Okay. By the way, for the
24 record, Mr. Dee, I just -- the definition
25 of Agency in Section 120.52 is broad enough

1 to include DOAH --

2 MR. DEE: Yes, sir.

3 JUDGE: -- Division of Administrative
4 Hearings.

5 MR. DEE: Yes, sir.

6 JUDGE: However, Section 120.52(5) has
7 a separate definition for DOAH and that is
8 the division. So when the Statute is
9 discussing action or consideration by the
10 Division of Administrative Hearings, it
11 describes it as the Division, distinguishing
12 it from the Agency.

13 MR. DEE: Yes, sir.

14 JUDGE: Okay. Mr. Berringer --

15 MR. BERRINGER: Yes.

16 JUDGE: -- anything different from the
17 comments of Ms. Derrick, Ms. Moody, Mr. Bock
18 and Mr. Spahr?

19 MR. BERRINGER: I do believe so, sir.

20 JUDGE: State your name for the record.

21 MR. BERRINGER: My name is Tom Berringer,
22 I'm from Cocoa. Also, I would like to ask a
23 request at this point. I have a severe
24 hearing problem and if you gentleman would
25 speak so I can hear you and also Your Honor.

1 JUDGE: I will try.

2 MR. BERRINGER: I appreciate that.

3 JUDGE: Go ahead.

4 MR. BERRINGER: Yes, sir. I guess you've
5 heard a lot of the different issues that are
6 involving and causing us to worry about our
7 home sites and our highways. But what I'd
8 like to share with you this morning is a
9 very personal one.

10 Being from the north, we seem to know
11 a little bit more about pollution, I guess,
12 than most of the folks down here on a citizen
13 basis, of course. And as we were able to
14 retire, we looked for places that we thought
15 we might like to retire in. And one of the
16 main reasons is -- to get away from the cold
17 is number one. But also with the cold there's
18 pollution.

19 And in the north it was rampant. And,
20 yes, it is improving. So we moved to Florida.
21 We have a little dream house, what I can afford
22 in a retirement community. You must be 55 and
23 over to be in that community. We have people
24 55 to 92, I believe. And a lot of widows, a
25 lot of widowers.

1 And when I came to this community, my
2 health was very good. I had some problems
3 that I brought with me, as we all probably
4 have. But then I looked around and saw a
5 lot of folks that had similar problems and
6 even worse and, sadly to say, I've missed
7 some of the folks that have passed on.

8 I say that to bring the point out
9 that we understand there is a pollution
10 condition with the Oleander Project. I
11 can't give you numbers, I don't know
12 anything about the particulars. You've
13 heard quite a bit and you folks have all
14 this before you.

15 My concern is this: As some of the
16 older folks expressed to myself as an
17 individual and to some of the other people
18 here that represented a movement against
19 the particular project, most of the
20 concern was the fact that you have older
21 ladies, older men that felt intimidated
22 because they moved here with the last
23 moneys they probably ever had, bought a
24 place and this is where they're going to
25 die from. They want to do this in

1 retirement status, and so do I.

2 And now we have a threat of a
3 condition which we don't have much control
4 over. And you've heard about the traffic.
5 Let me share a short story with you. We
6 have an old gentleman by the name of Larry,
7 he's up in Virginia right now in a rest
8 home. He was coming down 95, excuse me,
9 he was coming down Route 520 with his big,
10 old Cadillac, about a '79, and somehow he
11 ended up underneath a tanker coming off
12 of 95. He lived. He hurt his knee, that's
13 all he did. He hurt his knee.

14 Route 520 is one of the top 10 most
15 dangerous highways in Central Florida,
16 according to the newspaper, that's the
17 only thing I have to go on.

18 Our concern, sir, if this power house
19 does finally go in, we not only have to
20 worry about our old folks, and me, and
21 everyone that lives there, about their
22 driving down with all the extra truck
23 traffic that's going to be there adding
24 to our roads.

25 These folks feel so intimidated

1 that when we had these terrible wild
2 fires last year, myself and some other
3 folks in the community got phone calls,
4 what should we do? Should we go? What --
5 they were so intense and worried over
6 the fact that this is going to affect
7 them personally. And they're taking
8 this the same way.

9 You know, I heard Mr. Bock speak
10 about the fire -- or the water line.
11 They want to use recirculated water,
12 whatever you call it, from Cocoa, and
13 if they can't get that they're going to
14 tap into the main water line that runs
15 right down in front of our homes on 520.

16 But also, I don't know if you folks
17 know it, but the Fire Department's line
18 comes off that same line. Had the power
19 house been in operation and we had the
20 wild fires as close as they were last
21 year, and they were within like three
22 quarters of a mile, if that power house
23 was taking all the water or as much as
24 they could take out of that line, the
25 fire company would have had a real

1 problem pumping water out of that line.
2 It's the same line. The fire line and
3 the City water line, it's the same line.

4 These are points that a lot of folks
5 haven't heard. And we're just glad
6 today that we're able to bring some of
7 these facts out to you folks.

8 I mentioned some of the conditions
9 of the people living in the community. I
10 have first stages of asbestosis, okay.
11 I had open heart surgery in 1996, and
12 which I'm doing great, I got four new
13 arteries, man, I'll tell you, I feel
14 wonderful, thank God for that. I went
15 legally blind a year ago. And all these
16 are things that happens to us because of
17 our genes or occupation and things like
18 that. And I realize that.

19 But when I look at the people in
20 my community, they're worse off than I
21 am. And my heart goes out to them. And
22 they, in turn, would trust me to come
23 here today and tell you folks this, that
24 they are very concerned.

25 I think we have 246 actual houses

1 in our community. And when we were going
2 around and asking for donations for this
3 John Harris, the lawyer, and giving out
4 information about the meetings that were
5 held, we had probably 230 families that
6 donated. One widow who lost her husband
7 two years ago handed me a dollar, the
8 tears ran down my face. What are you
9 going to do? That's the concern she had,
10 dollar's worth. Unbelievable. Unbelievable.

11 We're scared. We know it's not going
12 to be a big, belching plant, we understand
13 that. It's just the way it's been done
14 that hurts us the most. They're coming
15 here as good citizens of the county, they
16 didn't even want to let us know they were
17 coming, sir.

18 And at this point we would only ask
19 that you would have mercy in your heart
20 today at this hearing and you will be able
21 to help do the right thing. And that
22 would be to not let them come in. Thank
23 you very much.

24 JUDGE: Okay. Mr. Rowe, that concludes
25 the public comment. Those are the individuals

1 that you identified as wishing to make public
2 comment, is that correct?

3 MR. ROWE: Those are some. There will
4 probably be some coming in later. Like I
5 said, a lot of these people have to work
6 and they do have to talk with their employers
7 in order to come here.

8 JUDGE: Okay. The other pending matter
9 that we have is Oleander's Motion to Strike.
10 That Motion, Mr. Dee, is, identifies phrases
11 such environmental injustice, families and
12 grandchildren and citizens as the offensive
13 language.

14 MR. DEE: Yes, sir, and I would like
15 to supplement that before you rule on it.

16 JUDGE: Go ahead.

17 MR. DEE: With regard to the allegations
18 about Mr. Rowe's legal standing to represent
19 other people, that portion of the Motion, we
20 believe, is well-founded and should be
21 granted.

22 With regard to his allegations about
23 this project being a crass commercial venture
24 being foisted upon the local north community,
25 we also believe that portion of the Motion

1 should be granted because the allegation is
2 purely speculative, it's clearly impertinent,
3 if not downright scandalous.

4 The third portion of that Motion,
5 though, deals with Mr. Rowe's concerns about
6 environmental injustice. At this time I'm
7 going to withdraw that portion of the Motion.
8 We have taken Mr. Rowe's deposition on August
9 13th and at that time he made clear that
10 he intended to pursue his environmental
11 injustice claims with U.S. Department of
12 Justice and EPA and anyone else who would
13 listen to him.

14 He's also made veiled reference to
15 his desire to take immediate appeal of
16 today's proceedings. Given the possibility
17 that Mr. Rowe will attempt to pursue an
18 appeal on those legal issues, we believe
19 that it is in our best interest to move
20 forward and address factual merits of the
21 allegations.

22 We believe that the issue is not
23 legally relevant in the sense that DEP
24 does not have the statutory authority to
25 address it. But in the event that someone

1 in a higher forum should disagree, we'd
2 like to have already covered the factual
3 merits of the claim because we believe
4 there is no factual support for the
5 allegation. So we're trying to cover
6 both sides of the issue.

7 And for that reason, we would ask
8 that you not strike the allegations of
9 environmental injustice.

10 JUDGE: Okay, Mr. Goorland?

11 MR. GOORLAND: Well, Your Honor, one
12 part of the statement that Mr. Dee made
13 that I agree with was, I agree that, you
14 know, it is not part of our standard
15 permitting jurisdiction. And therefore,
16 I don't think it becomes a relevant issue.
17 And I'm talking, of course, about that
18 environmental justice position.

19 The rest of that --

20 JUDGE: Are you objecting to Mr. Dee's
21 withdrawal of that portion of the Motion?

22 MR. GOORLAND: Well, I don't object
23 to his withdrawal of the Motion. However --

24 JUDGE: It's only a portion of the
25 position.

1 MR. GOORLAND: However, I'd like the
2 record to reflect our position.

3 JUDGE: As a matter of law.

4 MR. GOORLAND: Yes.

5 JUDGE: Okay, Mr. Rowe --

6 MR. ROWE: Yes, sir.

7 JUDGE: -- the Motion, that portion
8 of the Motion to Strike addressing the
9 issues of the phrase "environmental
10 injustice" has been withdrawn, but the
11 Motion remains with respect to that
12 portion of the Petition for Administrative
13 Hearing dealing with family, grandchildren
14 and citizens and gross commercial venture.

15 Do you wish to respond?

16 MR. ROWE: I'm not sure whether I
17 understand it, but -- could you give me
18 some clarifications? I thought he withdrew
19 his concern in reference to the subject.

20 JUDGE: The Motion to Strike moved to
21 strike three categories of language in the
22 Petition for Administrative Hearing.

23 MR. ROWE: All right, sir.

24 JUDGE: The first category was language
25 pertaining to environmental injustice.

1 MR. ROWE: Uh-huh.

2 JUDGE: That portion of the Motion to
3 Strike has been withdrawn.

4 MR. ROWE: Okay.

5 JUDGE: That leaves open for argument
6 that portion of the Motion to Strike
7 language in the Petition for Administrative
8 Hearing dealing with family, grandchildren
9 and citizens --

10 MR. ROWE: Uh-huh.

11 JUDGE: -- and gross commercial venture.

12 MR. ROWE: Yes, I'd like to address
13 that. Again, I go back into what I consider
14 the vested right or Constitutional rights,
15 a right to defend one's home and family.
16 When I speak of my children and my
17 grandchildren, I did give Mr. Dee a list
18 of my family and their addresses living
19 in the community.

20 He already knew there are Title V
21 pollutioners (sic) that are within this
22 community. It's like a glass of water,
23 it's filled to the rim. And even though
24 Oleander Power Company would like to come
25 in and say hypothetically with a quarter

1 of a teaspoon, that quarter of a teaspoon
2 once it hit that glass would overrun it.
3 So we have a real serious concern with
4 reference to it health and welfare.

5 — And I feel that as a citizen, a
6 father, that I have a right to protect
7 my family. Those are my offspring. My
8 friends and my neighbors, as well. And
9 I think we all have that right, based on
10 our constitutional rights.

11 It appears that Oleander Power Plant
12 is attempting to ride roughshod over
13 common citizens that does not have the
14 legal expertise or professional support
15 or services that they are fortunate enough
16 to have. I think that this is something
17 that people that have little or no income
18 should be given a right to voice their
19 concern and protect their family and their
20 community.

21 I feel that this is a Constitutional
22 right. And I feel that it is an investment
23 that I have to protect my family and ensure
24 that the impact or the adverse impact on
25 the environment, quality of air, quality of

1 water, quality of our community stay as
2 level as humanly possible, that my great
3 grandchildren might be able to enjoy the
4 benefits of this community which I have
5 watched and, and, as I see it, slowly
6 deteriorating, based on some of these
7 different impacts.

8 So I feel that that should stand.
9 I feel that it's a Constitutional right.
10 We send our kids to service to protect
11 this country and we have right here as
12 well to protect our families and our
13 communities. And I don't think we're
14 doing anything illegal or immoral.

15 JUDGE: The Motion to Strike is
16 granted as to that part which has not
17 been withdrawn.

18 Does Oleander wish to make opening
19 statement?

20 MR. DEE: Yes, sir, Your Honor.
21 Your Honor, the issue in this case is
22 whether the Florida Department of
23 Environmental Protection should issue a
24 permit for the Oleander Power Project.
25 And to state the issue more precisely,

1 the issue is whether Oleander has provided
2 reasonable assurances to DEP that Oleander's
3 project will comply with the applicable DEP
4 rules under the DEP program for the
5 prevention of significant deterioration of
6 air quality.

7 The prevention of significant
8 deterioration, or PSD permit, that is at
9 issue in this case, would authorize the
10 construction of certain facilities that
11 are potential sources of airborne emissions.
12 In this case, those facilities include five
13 combustion turbines that would be used to
14 generate electricity at an electrical power
15 plant that Oleander plans to build here in
16 Brevard County. It would also include two
17 fuel storage tanks.

18 In this case, the evidence will
19 demonstrate that the Florida Department of
20 Environmental Protection has, indeed,
21 carefully reviewed Oleander's application
22 and reached a preliminary decision to
23 issue the PSD permit to Oleander. The
24 evidence will further demonstrate the
25 DEP's decision is a critical one and the

1 PSD permit should, indeed, be issued.

2 The combustion turbines that are
3 at issue in this case truly represent
4 state of the art technology. The turbines
5 are extremely fuel efficient. They will
6 use much less fuel than the existing fleet
7 of similar oil and gas-fired power plants
8 here in Florida.

9 They will -- by using less fuel, they,
10 in turn, will produce less in the way of
11 airborne emissions.

12 In addition, these new generation
13 combustion turbines have design features
14 that are pollution prevention features.
15 They prevent the airborne pollution from
16 being formed in the first instance.

17 This project will use natural gas
18 as its primary fuel. Natural gas is
19 the cleanest burning fossil fuel that's
20 commercially available today for the
21 generation of electricity. If natural
22 gas is not available, very low sulfur
23 fuel oil will be used as a backup fuel.

24 This project will be a peaking
25 power plant. It will provide power to

1 the citizens of this community and the
2 State of Florida when there are peak
3 demands for electrical power. Those
4 peak demands typically occur during
5 the very cold winter months, the very
6 hot summer months, when your heater or
7 your air conditioner are on, or when
8 there's been an emergency such as a
9 hurricane.

10 As a result, this project will only
11 operate part time. In this case, Oleander
12 is only seeking authorization to operate
13 this plant a maximum of 3,390 hours per-
14 year, or approximately 39 percent of the
15 year. What that means is the remainder
16 of the year the plant will be idle.

17 There will be no airborne emissions from
18 the plant during those times.

19 When the plant is operational, it will
20 have to comply with very stringent emission
21 limits that are being imposed by the Florida
22 Department of Environmental Protection.

23 Those limits have been determined
24 through the analysis of the best available
25 control technology for this facility. This

1 project must comply with DEP's best available
2 control technology available. And indeed,
3 the limits that are being proposed in this
4 case are being used as a model for facilities
5 throughout the United States. They will set
6 the standard for other similar peaking
7 plants throughout the United States.

8 Now, Oleander has performed an
9 evaluation of the project's impacts on
10 ambient air quality. Oleander's analysis
11 was prepared in accordance with standard DEP
12 and EPA procedures and guidelines. That
13 analysis was very conservative. It
14 overestimates the potential impacts from
15 the project.

16 Even using a conservative analysis,
17 the evidence will demonstrate that the
18 project's maximum impacts on ambient air
19 quality will be less than one percent of
20 any of the ambient air quality standards
21 that are enforced by DEP. Those ambient
22 air quality standards were developed by
23 the United States Environmental Protection
24 Agency and, in turn, were adopted by the
25 Department of Environmental Protection.

1 The standards are expressly designed
2 to protect human health and welfare. They
3 were designed to protect everyone. That
4 includes children, that includes the elderly,
5 that includes asthmatics and other people
6 who are especially sensitive to sources of
7 airborne pollution. All of those people
8 are intended to be protected by the ambient
9 air quality standards.

10 In this case the project's maximum
11 impacts are 0.6 percent of the applicable
12 ambient air quality standards or less, 0.6
13 percent or less. In this case human health
14 and welfare will be protected by an
15 extremely wide margin.

16 The evidence presented today will also
17 demonstrate that the project complies with
18 all of the applicable, other applicable DEP
19 air quality standards and regulations.

20 Now, as I mentioned, the Department
21 has performed its own independent review
22 of the evidence of the application. They
23 have independently concurred with Oleander
24 that the PSD permit should be issued.

25 Now, you've heard a lot of comments

1 this morning from the public already, and
2 you also have reviewed Mr. Rowe's petition.
3 And notwithstanding the information that's
4 already been presented to DEP by Oleander
5 and notwithstanding the analysis that was
6 done by the Department, we continue to
7 hear from Mr. Rowe and the public about
8 their fears and their concerns with regard
9 to this project.

10 We certainly understand the concerns,
11 but I want to assure you that we have tried
12 to address those concerns and we will try
13 again today to address those concerns.

14 The first issue that Mr. Rowe has
15 raised is that Oleander should monitor the
16 air quality near the site. Now, as it turns
17 out, the Florida Department of Environmental
18 Protection already has a network of ambient
19 air quality monitoring stations located here
20 in Brevard County, throughout the region and,
21 indeed, throughout the State of Florida.

22 Further, the evidence will demonstrate
23 that additional ambient air quality monitoring
24 by Oleander is not required under any of the
25 applicable DEP regulations.

1 Further, such monitoring is not
2 warranted. Even if Oleander were to incur
3 the cost of installing an ambient air quality
4 monitor near the site or at some other
5 appropriate location in this county, you
6 wouldn't be able to measure a change in
7 ambient air quality after it starts operating.
8 For that reason, it would be inappropriate
9 and unwarranted for Oleander to incur the
10 additional expense of installing that monitor,
11 and that expense would range upwards of
12 \$100,000.

13 Now, Mr. Rowe and other members of the
14 public have mentioned that they are concerned
15 about the potential cumulative impacts of
16 air pollution here in Brevard County as a
17 result of the existing sources of air
18 pollution when combined with the potential
19 impacts associated with Oleander.

20 As you've heard, his analogy is that
21 the glass is full. I am happy to announce
22 that Mr. Rowe's concerns simply are not
23 well founded. The existing air quality in
24 Brevard County meets all of the applicable
25 ambient air quality standards that, as I

1 mentioned, have been promulgated expressly
2 to protect human health and welfare.

3 Nonetheless, in an effort to respond
4 to these concerns, Oleander did an analysis
5 of the cumulative impacts associated with
6 this project when combined with the effects
7 of the other power plants in this region.
8 The evidence will show that those impacts,
9 whether viewing Oleander individually or
10 cumulatively with the other facilities,
11 there will not be any measurable or
12 meaningful change in ambient air quality
13 in this region as a result of the power
14 plant that Oleander has proposed.

15 Mr. Rowe also in his deposition has
16 raised questions about the project's
17 impacts on water quality in surrounding
18 lakes and streams such as the Saint John's
19 River and Indian Liver Lagoon. It should
20 be noted that normally DEP does not require
21 an applicant for a PSD permit to determine
22 whether the airborne emissions from its
23 source will cause adverse impacts on water
24 quality. Nonetheless, here, too, Oleander
25 has attempted to evaluate Mr. Rowe's concerns.

1 The evidence will demonstrate that the
2 emissions in this case will be exceptionally
3 small. And because the emissions are
4 exceptionally small, the impacts on water
5 quality will be immeasurably small.

6 And the final issue that you've heard
7 us discuss this morning is the question
8 of environmental justice. Mr. Rowe has
9 alleged that DEP should not issue the PSD
10 permit in this case because the project
11 allegedly would not be consistent with
12 President Clinton's Executive Order with
13 regard to environmental justice issues.
14 The President's Executive Order applies
15 to federal agencies.

16 The order instructs federal agencies
17 to not take actions that would cause a
18 disparate or a disproportionate adverse
19 impact on minority neighborhoods or low
20 income populations.

21 As you've heard from Mr. Goorland,
22 DEP does not have the statutory authority
23 to consider or implement the President's
24 Executive Order. They have no statutory
25 authority to consider environmental justice

1 issues when they decide whether to issue
2 or deny a PSD permit.

3 Again, in an effort to respond to the
4 concerns that have been raised in this
5 community, in an effort to be proactive,
6 Oleander has addressed environmental justice
7 issues.

8 The evidence will demonstrate that
9 this project will have no meaningful adverse
10 impacts on any minority or low-income
11 neighborhood. There will not be any
12 disproportionate adverse impact on any
13 minority or low-income community.

14 Now, the evidence will be presented
15 by four witnesses that will be called on
16 behalf of Oleander. The first three
17 witnesses are Richard Zwolak, Ken Kosky
18 and Bob McCann. They're private consultants
19 employed with the firm of Golder, Incorporated.
20 These three witnesses are exceptionally well
21 qualified to offer the testimony that they're
22 about to give here today.

23 These three witnesses have performed
24 environmental socioeconomic analyses of many
25 of the power plants here in Florida. Indeed,

1 they have worked on many power plants around
2 the United States and they've worked on many
3 air pollution and environmental statements
4 throughout the globe, throughout the world.
5 Oleander's fourth witness will be a - - -
6 representative of the Florida Department of
7 Environmental Protection, Mr. Al Linero.
8 Mr. Linero is also qualified to discuss the
9 issues that have been raised in this case.

10 He has approximately 20 years of
11 experience working on air pollution issues.
12 He will explain on behalf of the Department
13 why DEP has concluded that the permit should
14 be issued for this project.

15 So in summary, we believe the evidence
16 will overwhelmingly demonstrate that this
17 project complies with all of the applicable
18 DEP criteria and, for that reason, the
19 Department should issue the PSD permit that
20 is in question.

21 JUDGE: Thank Mr. Dee. Mr. Goorland?

22 MR. GOORLAND: No statement.

23 JUDGE: Mr. Rowe, opening statement?

24 MR. ROWE: As previously stated, I have
25 no expertise, neither am I a lawyer, but we

1 do have a degree of sensitivity pertaining
2 to our community. Speaking of the already
3 accumulated polluters in Title V that are
4 already here and Oleander Power Plant, I
5 think, is also classed as a Title V, which
6 means it will contribute to the pollution
7 that's already here, I think it's important
8 that the people that live here, that have
9 concerns here, that have investments here
10 are heard.

11 And not only that, that they're listened
12 to. Oleander and its power and its financing
13 backing has been fortunate enough to have
14 some of the best witnesses, expertise, I
15 guess, that money can buy.

16 However, we are not fortunate enough to
17 have some eloquently -- and I don't know if
18 I'm doing a good job in speaking, but I
19 think it's important that we, too, be given
20 a form of justice in reference to what we
21 believe in hoping that we can live in peace
22 and harmony.

23 The Oleander plant is not something
24 that is desperately needed here. It appears
25 that the Oleander plant is here to profiteer.

1 There is a -- what is it, Florida Power and
2 Orlando Utilities, they are power sources,
3 they do contribute to the pollution. Matter
4 of fact, Orlando Utility has just recently
5 been fined about \$25,000 in violation for
6 contributing to some of these ill-fated
7 things.

8 My concern is that we just have so much
9 here that there is no compelling need for
10 Oleander Power Plant in this particular
11 community, there is no benefit to the
12 citizens. They're not going to reduce the
13 rate of the power that we utilize here.

14 There's really no job opportunities
15 here. We talk about 12 people, we don't
16 even know if those 12 people that they're
17 talking about hiring is either local or
18 shipped in.

19 We're seriously concerned in reference
20 to our health and welfare of this community
21 and we are hoping that you will deny this
22 petition.

23 We -- even though the DEP might not
24 have certain jurisdiction, I know that
25 during our telephonic conference you stated

1 that you didn't have jurisdiction in
2 reference to the environmental justice
3 issue, and perhaps there are other things
4 that these agencies might not have
5 jurisdictions in.

6 However, I think it's important that
7 wherever those jurisdiction lies, that power
8 and that are authority lies, that the issue
9 continue. I have requested that you consider
10 forwarding this information to the proper
11 authorities for consideration of these issues,
12 hope that you will take that in consideration
13 in doing so.

14 But the bottom line is that there's an
15 awful lot of people that have a real serious
16 concern and have voiced that concern, but it
17 doesn't appear that it's having any real
18 degree of sensitivity in catching the ear of
19 those concerned.

20 However, we will do whatever the proper
21 procedures are and follow those procedures
22 until we can reach to a plateau that we might
23 be able to seek justice. We, therefore,
24 request that the permit be denied.

25 JUDGE: Okay. Mr. Dee, how long are

1 your first three witnesses going to take?

2 MR. DEE: This is just a lunch scheduling
3 issue, so let's go off the record.

4 (Whereupon, discussion was held off the
5 record.)

6 JUDGE: Let's go back on the record.
7 We'll get to that, Mr. Rowe.

8 Mr. Dee, call your first witness.

9 Oh, and for the record, when you're
10 presenting expert testimony --

11 MR. DEE: Yes, sir.

12 JUDGE: -- have you, Mr. Rowe, have
13 you reviewed the qualifications of these
14 experts?

15 MR. ROWE: Sir, even if I did, it
16 really doesn't mean anything to me. I'm
17 just a common --

18 JUDGE: You have a right to object
19 to the qualifications of the experts, and
20 if you want to, if you want Mr. Dee, Mr.
21 Dee to lay those qualifications out on
22 the record as what we call laying a
23 predicate for the tender of the expert,
24 then that's your right to do that.

25 If you don't have any objection to

1 that, then Mr. Dee can submit the
2 qualifications of the experts in the
3 form of a resume' and then we can proceed
4 to the substance of their testimony.

5 MR. ROWE: I would request that he
6 do that first thing you just stated.

7 JUDGE: Okay, call your first witness.

8 MR. DEE: Yes, sir.

9 MR. GOORLAND: Your Honor, would it
10 be possible to take a break?

11 JUDGE: You wanted a recess, I'm sorry,
12 let's do that.

13 (Whereupon, a recess was taken in the
14 proceedings.)

15 JUDGE: Okay, back on the record.

16 Mr. Dee, call your first witness.

17 MR. DEE: Yes, sir, at this time
18 Oleander would call Mr. Richard Zwolak.

19 JUDGE: Mr. Zwolak.

20

21 WHEREUPON,

22

 RICHARD ZWOLAK,

23 being first duly sworn by the Court Reporter to tell the

24 whole truth as hereinafter certified, was examined and

25 testified under the oath as follows:

1 JUDGE: State your first and last name
2 and spell each name for the record.

3 THE WITNESS: My name is Richard Zwolak,
4 R I C H A R D, capital Z W O L A K.

5 JUDGE: Okay. Mr. Dee.

6 MR. DEE: Your Honor, as a preliminary
7 matter, let me just point out, this is a
8 complete set of the Exhibits that Oleander
9 will be introducing today. This is your set.
10 We have a separate set over here for the
11 Witness to use, and I've already given a
12 full set to Mr. Goorland and a set was
13 provided to Mr. Rowe.

14 JUDGE: Okay.

15 DIRECT EXAMINATION

16 BY MR. DEE:

17 Q. Mr. Zwolak, are you familiar with the Oleander
18 Power Project that is the subject of this proceeding?

19 A. Yes, I am.

20 Q. Would you just explain very briefly as to how you
21 became familiar with the project.

22 A. Golder was commissioned in 1996 to conduct the
23 preliminary investigation of the site, as well as several
24 other sites in Florida for either a simple cycle or combined
25 cycle power plant.

1 The proposed Oleander site was one of those sites.

2 Q. You mentioned Golder, is that where you're
3 employed?

4 A. Yes, sir.

5 Q. And what is Golder?—

6 A. Golder is an international environmental and
7 engineering consulting firm.

8 Q. What is your job title at Golder?

9 A. I have two titles. One is Director of
10 Environmental Planning, and the other is Power Sector Program
11 Manager.

12 Q. And what are your general duties and
13 responsibilities at Golder?

14 A. With respect to the Director of Environmental
15 Planning, I'm responsible for conducting environmental
16 studies and multidisciplinary studies to support our public
17 and private sector clients. Those multidisciplinary studies
18 often involve evaluation of air and water resources, ecology
19 and land use.

20 Q. What academic training do you have for your work at
21 Golder?

22 A. I received a Bachelor of Arts degree in Geography
23 from the University of South Florida in 1976. And I also
24 received a Master's of -- degree in Geography from the
25 University of South Florida in 1979.

1 Q. Did your Master's degree include any courses
2 involving environmental planning or other related subjects?

3 A. Yes, the environmental planning discipline was
4 incorporated within the program at the time of my education.
5 The types of courses that were part of the curriculum
6 included Social Science Statistics, Physical and Cultural
7 Geography.

8 Q. Would that include analysis of socioeconomic
9 issues?

10 A. Yes, it would.

11 Q. All right. Do you have any professional
12 certifications?

13 A. Yes, I am certified by the American Institute of
14 Certified Planners. That is a nationally recognized
15 certification program for planning professionals.

16 Q. When did you receive that certification?

17 A. I received that certification in 1986.

18 Q. So approximately how many years of experience do
19 you have working on environment and land use studies?

20 A. I have one year of experience in the public sector
21 and then 20 years as a private consultant.

22 Q. Could you just give us an overview of the kinds of
23 projects that you've worked on during your career.

24 A. Yes, they generally fall into three categories.
25 One is the siting of community infrastructure. That would

1 include utilities such as power plants and transmission
2 lines. It also involves other infrastructure such as
3 pipelines, highways, airports, landfills.

4 Another major component of my work during the 20
5 years has been the environmental assessment of those proposed
6 facilities on both the physical and biological environment as
7 well as on the cultural environment.

8 In addition, I have been responsible for seeking
9 permits and approvals from federal, state and local agencies
10 for those projects.

11 Q. What kinds of permits have you been responsible for
12 obtaining for these projects?

13 A. The permits that are typically required and that
14 I've been responsible for obtaining include air construction
15 permits, including prevention of significant deterioration,
16 including water use permits, waste water and storm water
17 permitting, dredge and fill permitting and comprehensive plan
18 amendments, rezoning and site plan approvals.

19 Q. How many -- approximately how many environmental
20 impact studies and environmental analyses have you performed
21 over the last 20 plus years?

22 A. Well over 200 studies.

23 Q. And how much projects have you worked on where
24 you've had to evaluate the environmental permitting and land
25 use issues concerning an electrical power plant or electrical

1 transmission line?

2 A. That would be well in excess of 20 studies.

3 Q. Has all of your work been performed here in
4 Florida?

5 A. It has not. Most of my work has been conducted in
6 Florida. However, I have worked in approximately 20 other
7 states as well as over half a dozen foreign countries.

8 Q. Has all of your work been performed for private
9 clients?

10 A. It has not. I have worked directly for federal
11 and state governments, agencies, including environmental
12 agencies, as well as local governments. That would be
13 counties as well as cities.

14 Q. Who employed you for your work overseas?

15 A. A number of clients, the most frequent of which was
16 the World Bank.

17 Q. Have you ever been qualified and allowed to testify
18 as an expert witness before?

19 A. I have, yes.

20 Q. And what areas have you addressed in your testimony
21 as an expert witness?

22 A. In previous proceedings, I've qualified as an
23 expert in environmental planning, resource planning, land use
24 exhibit analysis, environmental impact analysis and
25 socioeconomic analysis.

1 Q. Have you ever appeared before any regulatory body
2 or agency to render opinions concerning the environmental
3 impacts associated with an electrical power plant?

4 A. Yes, I have. I've appeared before federal, state
5 and local agencies to either present findings of our studies
6 or to seek approval for projects.

7 Q. Mr. Zwolak, I've previously showed you Exhibit 16.
8 Is Exhibit 16 a true and correct copy of your resume'?

9 A. Yes, it is.

10 Q. Does your resume' accurately summarize your
11 academic and professional accomplishments?

12 A. It does, yes.

13 MR. DEE: Your Honor, at this time we
14 would proffer Mr. Zwolak as an expert
15 concerning land use planning --

16 JUDGE: Go ahead.

17 MR. DEE: -- land use analyses and
18 socioeconomic and environmental impact
19 assessments.

20 JUDGE: Mr. Goorland, any objection?

21 MR. GOORLAND: No objection, Your Honor.

22 JUDGE: Mr. Rowe, any objection?

23 MR. ROWE: No objection.

24 JUDGE: The Witness is accepted as an
25 expert for the purposes tendered without

1 objection.

2 BY MR. DEE:

3 Q. Mr. Zwolak, you mentioned that you began working
4 for Oleander in 1996?

5 A. That's correct.

6 Q. And what were you asked --

7 JUDGE: Before we go any further, did
8 you intend to admit -- to submit Oleander 16?

9 MR. DEE: That and other exhibits when
10 his testimony is completed.

11 JUDGE: Okay, go ahead. Just so the
12 parties know, if you want to submit something
13 for admission in evidence, then you have to
14 say that. Because just identifying it doesn't
15 submit it for admission.

16 Okay, go ahead, Mr. Dee.

17 BY MR. DEE:

18 Q. You mentioned that you began work for Oleander
19 in 1996 --

20 JUDGE: Just a minute. You're going
21 to have to -- if you want to continue to
22 confer, you're going to need to move so
23 that you're outside of my ear shot because
24 it's distracting, I can't hear what's
25 going on.

1 UNIDENTIFIED SPEAKER: I'm sorry.

2 JUDGE: You're free to remain there,
3 but if you want to confer go someplace
4 else.

5 — Go ahead.

6 BY MR. DEE:

7 Q. What were you asked to do for Oleander in 1996?

8 A. I was asked to evaluate the Oleander site and
9 determine its suitability for a power plant. We evaluated
10 air and water resource aspects of the site on the project as
11 well as ecological and land use considerations.

12 Q. And what were your general responsibilities
13 concerning this project?

14 A. I was the Project Manager responsible for oversight
15 of that entire study.

16 Q. Were you also responsible for obtaining all of the
17 local and state and federal permits and approvals for the
18 project?

19 A. Yes.

20 Q. All right. In general terms, can you tell us what
21 Oleander wants to build in Brevard County.

22 A. Yes. The proposed Oleander Project is a peaking
23 power plant. It will use five combustion turbines to
24 generate approximately 850 megawatts of electricity. It is
25 a peaking facility and, as such, it is designed to operate

1 only during a portion of the year, that portion of time when
2 the demand for electricity exceeds the supply that would
3 otherwise be provided by base load facilities.

4 Q. And when would that occur?

5 A. Generally, that occurs due to weather extremes,
6 either very hot weather or very cold weather. It can also
7 occur on the basis of various types of emergency type
8 situations, some of which are also weather related.

9 Q. Since Oleander is building a peaking plant, has
10 Oleander agreed to limit the operations of this facility?

11 A. Yes, they have.

12 Q. And what -- can you summarize those limitations for
13 us?

14 A. Yes, those limitations, which are included in both
15 the draft permit issued by DEP and the Stipulated Settlement
16 Agreement issued by Brevard County, would include a
17 limitation of 3,390 hours per year, that's approximately 30
18 percent of the hours in a year.

19 And there's also a limitation to the amount of fuel
20 oil that would be used as a backup to the primary supply of
21 natural gas. And that limitation is 1,000 hours per year.

22 Q. What is Oleander's expectation with regard to the
23 actual operation of this facility? How many hours is it
24 really expected to operate?

25 A. Well, the request in the permit application and

1 subsequent document is for what is perceived to be the
2 maximum potential, which would be the 3,390. We have
3 evaluated a number of scenarios, one of which is frequently
4 used as the basis for conceptual design, is 400 hours on
5 natural gas and 400 hours on fuel oil.

6 Q. Historically, how many hours have the other peaking
7 plants in Florida operated?

8 A. Historically, much less. And there are certainly
9 quite a number of peaking plants and they're all used very
10 differently by different utilities and independents. But
11 historically less than 800 hours per year.

12 Q. Now, what kind of equipment will actually generate
13 the electricity in this case?

14 A. Those would be five combustion turbines.

15 Q. And how much power will they produce?

16 A. Under nominal condition, 850 megawatts.

17 Q. You mentioned combustion turbines. Are combustion
18 turbines used at other facilities here in Florida?

19 A. Yes. It is the dominant type of technology that's
20 being proposed today. There are well over 80 sites in
21 Florida under both a simple cycle configuration, which you
22 use for peaking purposes, and combined cycle configuration,
23 which is typically used for longer term operation.

24 Q. Can you give us an example of some combustion
25 turbines that are currently being used here in Florida?

1 A. Certainly. I have been involved in permitting a
2 number of plants, some of them being the University of
3 Florida cogeneration plant on the campus of the University
4 of Florida. There are two cogeneration plants in the Tampa
5 and Orlando areas that employ a combined cycle technology
6 using combustion turbines.

7 Walt Disney World has a combustion turbine that
8 generates a substantial amount of their electrical needs.
9 And there are also a number of simple cycle and combined
10 cycle configurations in urbanized areas of southeast Florida
11 such as the City of Lake Worth.

12 Q. Now, you mentioned the combustion turbine at the
13 University of Florida. Where is that in relation to Shands
14 Hospital?

15 A. That is immediately west of the hospital.

16 Q. So it's in very close proximity to the Shands
17 Hospital.

18 A. It's within 700 to 800 feet of the hospital
19 structure.

20 Q. All right, sir. And you mentioned that there was a
21 similar facility at Walt Disney World.

22 A. That is correct.

23 Q. Can you tell us where that is located in relation
24 to other landmarks at Disney World.

25 A. That is situated, the plant at Disney World is

1 situated about 1,200 feet from the Magic Kingdom,
2 Cinderella's Castle. It's also situated in close proximity,
3 by that I mean several hundred feet, to the employees' day
4 care center.

5 Q. You mentioned a facility at Lake Worth. Is that
6 facility located near any local landmarks?

7 A. Yes. It's located immediately adjacent to
8 Interstate 95 and just south of the Lake Worth High School.

9 Q. You mentioned other similar facilities. Are there
10 any that are located in close proximity to residential
11 neighborhoods?

12 A. Yes, most of the facilities that I've mentioned
13 with, perhaps, the one exception being Shands Hospital is
14 located in areas that have residences within 1,000 feet from
15 the project site boundary.

16 Q. All right, sir. I'd like you to turn to Exhibit 36
17 and show us where this project will be located.

18 A. Exhibit 36 is a project location map, and I do have
19 this in a larger size. If you wish, I can use that.

20 Q. Why don't you show us the larger one, then.
21 So you're looking at a blowup of Exhibit 36?

22 A. I am.

23 Q. Can you identify some of the landmarks in the
24 community for us?

25 A. And I'll go ahead and mark it as Exhibit 36.

1 Exhibit 36 is a reproduction of a map showing the
2 Central Brevard area. It shows the main land portion of
3 Central Brevard, as well as the barrier islands.

4 The proposed project site is located just west of
5 the municipal limits of the City of Cocoa. It is also
6 located in the northeast corner, or near the northeast corner
7 of the interchange of State Road 520 and Interstate 95.

8 Q. So we're east of 95 and north of 520?

9 A. That's correct.

10 Q. All right, sir. Where is this site in relationship
11 to the town of Mims, Florida?

12 A. Mims, Florida, is located just about due north of
13 the proposed project site, approximately 21 miles north.

14 Q. All right, sir. Now, I'd like you to look at
15 Exhibit 35, and I'd also like you to use your aerial
16 photograph to show the area surrounding the proposed site.

17 A. Exhibit 35 is an aerial photograph that was taken
18 by a subcontractor of Golder in 1998. I'll go ahead and mark
19 the board as Exhibit 35, as well, the presentation board.

20 The Exhibit depicts the existing conditions around
21 the plant site. The plant site itself includes either the
22 existing land use that will, would remain to a certain degree
23 after construction's complete. And it also shows the
24 proposed project superimposed on this existing aerial
25 photograph.

1 Q. Can you tell us what's in the area surrounding the
2 site?

3 A. Yes. As Exhibit 35 depicts, the existing area is,
4 is largely undeveloped. The businesses that are closest to
5 the proposed site include several commercial and industrial
6 type businesses. Further to the east of the proposed site
7 are additional industrial and commercial uses along the
8 frontage of Cox Road. Those would be primarily on the west
9 side of Cox Road.

10 To the north is an existing substation which the
11 project would propose to interconnect with. To the west of
12 the proposed project footprint and still on the project site
13 boundary are existing electrical transmission lines.

14 And further to the south there is an area of
15 undeveloped land.

16 Q. And where is I-95 in relation to the project?

17 A. I-95 is located to the west of the project and is
18 identified as that highway in the lower left corner of
19 Exhibit 35.

20 Q. All right, sir. Do you have an aerial photograph
21 that would also depict the land uses in the area surrounding
22 the site?

23 A. Yes.

24 MR. DEE: That particular Exhibit is
25 not included in Oleander's Exhibit list.

1 Mr. Zwolak just provided that to us today.

2 I would propose to identify that Exhibit

3 as 46.

4 Mr. Zwolak, if you'll give me copies

5 of that Exhibit.

6 THE WITNESS: -I have those.

7 MR. DEE: All right, we need to distribute

8 them to the parties.

9 THE WITNESS: Okay.

10 JUDGE: For the record, Oleander's 46

11 is what?

12 MR. DEE: It's an aerial photograph of

13 the area that includes the site as well as

14 surrounding developments.

15 BY MR. DEE:

16 Q. Mr. Zwolak, would you use Oleander's Exhibit 46 and

17 describe the area surrounding the proposed site?

18 A. Yes, referring to Exhibit 46, the central portion

19 of the aerial photograph is a, is where the project site is

20 located. So this not only shows the existing businesses that

21 I described on Exhibit 35, but it also shows the property

22 that would be occupied by the proposed simple cycle power

23 plant.

24 This particular Exhibit does show Interstate --

25 I-95 to the west. It also shows State Road 520 to the south.

1 It identifies the commercial and industrial
2 businesses on the west side of Cox Road.

3 It also identifies some of the closest residential
4 areas which are located over 1,400 feet to the east and to
5 the west of the proposed site.

6 Q. How is the site identified on Exhibit 46?

7 A. It is depicted by a dark blue boundary that
8 circumscribes the three parcels of land that comprise the
9 project site. Most of the site is located to the north of
10 Townsend Road, which is a road that runs north/south from
11 State Road 520, and then turns to the west.

12 There is a small portion of the site that's located
13 to the south of Townsend Road.

14 MR. GOORLAND: Excuse me one second. Is
15 it possible, Your Honor, that we could perhaps
16 rearrange the board a little so that he can
17 stand to the side of it rather than in front
18 of it?

19 MR. DEE: If this gentleman here would
20 move over to Richard's seat, then Richard
21 can stand to one side.

22 MR. GOORLAND: Thank you.

23 MR. DEE: That might be a little easier
24 to see.

25 MR. GOORLAND: I apologize for the

1 interruption, Your Honor.

2 THE WITNESS: Thank you. Just to
3 reiterate a little bit, Exhibit 46 identifies
4 the site boundary in dark blue, it identifies
5 the nature of the site and the surrounding
6 properties as being surrounded by either
7 industrial, commercial or utility uses.

8 Identifies some of the infrastructure in
9 the area, I-95 and State Road 520 to the south
10 and west respectively, and it also identifies
11 the closest residential areas which are to
12 the east of Cox Road and to the west of
13 Interstate 95.

14 BY MR. DEE:

15 Q. What is the zoning for the site?

16 A. The zoning for the existing site is IU, which is
17 light industrial.

18 Q. All right, sir, and what is the zoning for the
19 surrounding area?

20 A. The surrounding area is zoned primarily light
21 industrial, as well. That would include properties to the
22 east, north and west. There is a small portion to the
23 southeast of the project site zoned heavy industrial and the
24 property to the south of, the southern portion of the site is
25 zoned tourist commercial.

1 Q. All right, sir. I'd like you to use Exhibit 35 and
2 45 to describe Oleander's proposed plan for developing the
3 site.

4 JUDGE: Give me those Exhibit numbers
5 again.

6 MR. DEE: Yes, sir, 35 and 45.

7 JUDGE: Okay.

8 THE WITNESS: Exhibit 35 is a conceptual
9 drawing of what the proposed project would look
10 like after build-out. It is superimposed on an
11 oblique aerial photograph, oblique color aerial
12 photograph that was taken by a sub contractor
13 in 1998.

14 The Exhibit Number 45 is a site plan of
15 the proposed project located within the proposed
16 site boundaries showing the orientation of the
17 equipment on the project site.

18 BY MR. DEE:

19 Q. What are the major components of the project?

20 A. The five combustion turbines which would be used to
21 generate electricity are oriented on an east/west orientation
22 located just south of the existing substation and just west
23 of the existing transmission lines that abut the project
24 site.

25 To the east and to the south of those combustion

1 turbines are water treatment and storage equipment. Also,
2 further to the southeast of the project site, the location
3 where the combustion turbines are located is fuel, you know,
4 location and storage would occur.

5 In areas peripheral to these major components,
6 those areas being to the east, south and southwest of the
7 equipment, is where storm water management facilities would
8 be developed to maintain the storm water on site.

9 Q. Approximately how tall will the features of the
10 project be in relation to ground level?

11 A. The tallest features would be the stacks for each
12 combustion turbine, so there would be five stacks associated
13 with the project, each being 60 foot above ground level.

14 There are a series of ancillary equipment stored
15 with the combustion equipment which would all be lower than
16 that. The other major structures on site would be both the
17 water storage tanks and the fuel tanks. And those tanks
18 would be generally 35 to 45 feet in height.

19 Q. All right, sir. Why was this site selected for the
20 proposed project?

21 A. Well, it provides for an opportunity to develop a
22 project without impacting a residential area. It is located
23 immediately adjacent to a substation. It's located adjacent
24 to transmission lines and a natural gas pipeline which would
25 provide the primary fuel source.

1 It is located in an area that is zoned for
2 industrial development, that is designated for both light and
3 heavy industrial use in the comprehensive plan, and it
4 provides a significant buffer not only because of the site
5 arrangement but the immediately adjacent off-site uses, it
6 provides a significant buffer to the closest residential
7 areas.

8 Q. Does this site have good characteristics for its
9 proposed use?

10 A. Yes, it's good -- excellent characteristics for
11 this proposed use.

12 Q. How will Oleander obtain water for the project's
13 needs?

14 A. The plan to supply water to the project comes from
15 a thorough evaluation of all the alternatives that were
16 investigated in the early part of 1998. What is proposed is
17 to utilize reclaimed water to the greatest extent practical.

18 And there would be an agreement between the City of
19 Cocoa and the Applicant, Oleander Power, to supply that
20 reclaimed water.

21 Oleander intends to develop infrastructure in
22 concert with the City of Cocoa to supplement that reclaimed
23 water with a storm water supply. That would supplement
24 reclaimed water when it was not available.

25 Potable water would be used only as a last resort

1 if reclaimed water and storm water were not available.

2 Q. What would Oleander do with the waste water that's
3 generated on site?

4 A. The minimal amounts of storm water -- excuse me,
5 of waste water that would be generated on site would be
6 discharged back to the City of Cocoa.

7 Q. So there will be no discharges of industrial waste
8 water into the environment on this site?

9 A. That's correct.

10 Q. All right. Will there be a well installed on site
11 to obtain groundwater on site?

12 A. No, groundwater is not a source of makeup water for
13 the project.

14 Q. Do you know whether Oleander has offered to comply
15 with any conditions or limitations on the development of this
16 project?

17 A. Yes. There are a number of conditions and
18 limitations.

19 Q. You had mentioned a Stipulated Settlement Agreement
20 a few moments ago.

21 A. Yes.

22 Q. Does that document contain the conditions and
23 limitations you're referring to?

24 A. It does.

25 Q. And what kinds of conditions and limitations were

1 BY MR. ROWE:

2 Q. In reference to knowing that this is a Title V, it
3 says the proposed project will be a new air pollution source
4 that will result in an increase in emissions in Brevard
5 County. I think you might have testified to the effect that
6 that chart that I think was Exhibit 28, would that be the
7 emission that this plant will be producing at that particular
8 time, being Title V and increasing the air emissions in
9 Brevard County? I'm just reading something off this document
10 here.

11 A. Yeah, that Exhibit shows that emissions would be
12 above the threshold, which would be considered a major
13 source.

14 Q. Uh-huh.

15 A. That's -- in the definition within the Department's
16 rules, that's synonymous with a Title V source, which Title V
17 is Title V of the Clean Air Act.

18 Q. Let me ask you another question. In reference to
19 the number of different pollutants or polluters already in
20 Brevard County, how does one determine when you have reached
21 the maximum level? I understand if Oleander Power Plant was
22 only producing one percent pollution, how does that compare
23 with the rest of the pollutants that are already here?

24 I mean, do they say one and one is two and three
25 is five and et cetera and that we're hitting a danger zone

1 a week and a half -- 20 or 31 percent polluters are Title V?
2 When is enough and when is not enough?

3 A. Well, as I mentioned, there's sort of two
4 components of looking at air quality. One is the emissions
5 which more than not are criteria for review, whether it's
6 technology or whether it's a permit.

7 Then there's the air quality effects, which as I
8 indicated, Mr. McCann will likely testify on the air quality
9 effects.

10 Q. Oh, okay. So the things are slightly different,
11 and the air quality is when you evaluate whether the impacts
12 are either at or near any kind of public welfare or health
13 effects. That's just including the Oleander, but does that
14 take into consideration other pollutants in the community?

15 A. It can, yes. It can evaluate that. There's
16 various thresholds of impacts that was adopted by the
17 Environmental Protection Agency, adopted by DEP as part of
18 their regulations. If it's below those thresholds, then it's
19 considered to be insignificant.

20 They're sort of thresholds of whether or not you
21 have to do a complete analysis for the pollutants or whether
22 you have to look at it in more detail.

23 Q. Based on your analysis, is this a complete analysis
24 of all the different pollutants that it doesn't supersede
25 whatever the regulated requirements are?

1 A. Well, the analysis that was submitted in Exhibit
2 One included everything that's required to evaluate in terms
3 of all the pollutants and the threshold criteria.

4 We looked at modeling every PSD pollutant, which
5 I believe--I listed in Exhibit 29, and valued that relative to
6 levels that both EPA and DEP considered to be significant.

7 Then -- and that sort of judged whether or not you
8 do further analysis.

9 Q. Did it come out where you had to do further
10 analysis?

11 A. The impacts are all less than what's considered to
12 be significant. In fact, in many cases, many times less than
13 significant.

14 And these significant levels are about one to two
15 percent, that is, ten times lower, or 100 to 50 times lower
16 than the ambient air quality standard, so they're very, very
17 low. So if you're less than that, it's even lower.

18 Q. That includes Oleander -- I mean, not Oleander as
19 well as Orlando Utilities or FPL or anybody else that might
20 be producing the very same pollutants?

21 A. Well, the impacts when you get to that low,
22 generally you're not required to do that. The next witness,
23 Mr. McCann, will discuss the air quality analyses in more
24 detail.

25 MR. ROWE: I don't have any further

1 questions.

2 Judge: Redirect?

3 MR. DEE: No, sir.

4 JUDGE: Thank you, you're excused
5 from your oath, you're excused as a
6 witness.

7 Call your next witness.

8 MR. DEE: At this time Oleander would
9 call Mr. Robert McCann, Junior

10

11 WHEREUPON,

12

RICHARD McCANN,

13 being first duly sworn by the Court Reporter to tell the
14 whole truth as hereinafter certified, was examined and
15 testified under the oath as follows:

16

JUDGE: State your first and last

17

name and spell each name for the record.

18

THE WITNESS: Robert, McCann, R O B E R T,

19

McCann, M C C A N N.

20

JUDGE: Mr. Dee.

21

DIRECT EXAMINATION

22

BY MR. DEE:

23

Q. Are you familiar with the Oleander Power Project

24

that is the subject of this proceeding?

25

A. Yes, I am.

1 Q. Could you tell us just tell us briefly why you're
2 familiar with it?

3 A. I was involved in preparing the air quality impact
4 assessment for the project.

5 Q. Where are you employed?

6 A. I'm employed at Golder Associates, Incorporated.

7 Q. And what are your general duties and
8 responsibilities at Golder?

9 A. I'm an associate and Manager of the Air Resources
10 Group. This group consists of professionals who perform work
11 in air dispersion modeling, air permitting and monitoring of
12 air pollutants and noise.

13 Q. What academic training do you have for your work?

14 A. I have a Bachelor of Science in Meteorology in 1993
15 from Lowell Technological Institute out of the University of
16 Massachusetts at Lowell.

17 Q. How many years of experience do you have working on
18 air pollution issues?

19 A. About 25 years.

20 Q. Could you summarize your work experience for us?

21 A. Yes, after graduation from college in 1993, I
22 worked at Environmental Research and Technology, now known
23 as ENSR, E N S R, in Lexington and Concord, Massachusetts.
24 I was a staff scientist, Project Manager and Assistant
25 Manager of the Air Impact Section within the Air Quality

1 Studies Division.

2 From 1982 to 1986 I was employed at KBN Engineering
3 Applied Sciences in Gainesville, Florida, and I was the
4 principal scientist as well as Manager of the Air Resource
5 Group.

6 From -- I'm sorry, I was employed at Environmental
7 Science and Engineering from 1982 to 1986. From 1986 to 1995
8 I was employed at KBN Engineering and Applied Sciences
9 maintaining -- I was Manager of the Air Resource Group as
10 well as Manager of the Gainesville office.

11 Beginning in 1996 when KBN merged with Golder, I
12 became an associate as well as manager of the Air Resources
13 Group within that company, within the company.

14 Q. Approximately how many air quality analyses have
15 you performed in your career?

16 A. Literally hundreds of air dispersion impacts as
17 well as air monitoring assessments.

18 Q. Could you just generally describe the types of
19 projects you've worked on?

20 A. These projects mainly involved new source review
21 under some regulation such as the prevention of significant
22 deterioration regulation as well as for sources located in
23 non attainment areas, building downwash effects, long-range
24 transport assessments, rated at 100 kilometers, as well as
25 gas and particle deposition on soils and vegetation.

1 Q. Have you taught any professional courses in your
2 field?

3 A. I've taught several air dispersion modeling courses
4 for both private industry as well as public workshops in the
5 United States as well as foreign countries such as Argentina
6 and the Dominican Republic. For those courses, I instructed
7 professionals who were evaluating the air quality effects for
8 permitting purposes such as PSD or non attainment provisions.

9 Q. Have you ever been qualified to testify as an
10 expert witness in any proceeding?

11 A. Yes, I have.

12 Q. Could you just tell us generally what was it you
13 addressed in those cases?

14 A. I was qualified as a, in the field of meteorology
15 and air quality impact quality assessments for eight site
16 certification hearings. Over the last 12 years, 13 years,
17 these involved site certifications for the Seminole Electric
18 Company, Hardee Unit 3 facility in 1995, the original units,
19 Hardee 1 and 2 in 1990. In 1985 and 1986 in Broward County
20 the resource recovery facilities and then several others in
21 the State of Florida.

22 Q. I'd like you to take a look at Exhibit 15 and tell
23 me if that's a true and correct copy of your resume'.

24 A. Yes, it is.

25 Q. Does your resume' accurately summarize your

1 academic and professional accomplishments?

2 A. Yes, it does.

3 MR. DEE: Your Honor, at this time
4 Oleander would tender Mr. McCann as an
5 expert in meteorology, air quality
6 dispersion modeling and air pollution
7 impact assessments.

8 JUDGE: Mr. Goorland?

9 MR. GOORLAND: No objection.

10 JUDGE: Mr. Rowe?

11 MR. ROWE: No objection.

12 JUDGE: The Witness is accepted as
13 an expert for the purposes tendered
14 without objection.

15 Go ahead, Mr. Dee.

16 BY MR. DEE:

17 Q. Mr. McCann, what are ambient air quality standards?

18 A. Ambient air quality standards set limitations on
19 the total amount of air pollutants that can occur in a
20 certain area.

21 Q. Who sets ambient air quality standards?

22 A. EPA sets the standards and then states such as
23 Florida can adopt them.

24 Q. What is the basic purpose behind the promulgation
25 of ambient air quality standards?

1 A. The basic purpose is to protect the general health
2 and welfare of the public. There are two types of air
3 quality standards, primary standards and secondary standards.

4 The primary standards are designed to protect the
5 public health, while the secondary standards are designed to
6 protect the public welfare with an adequate margin of safety
7 from known or adverse effects of air pollutants. Generally,
8 the secondary standards are equal to or lower than the
9 primary standards.

10 Q. Are the ambient air quality standards designed to
11 protect everyone?

12 A. Yes, they are, they're designed to protect the very
13 young, children, the elderly, as well as the sick, including
14 those with respiratory problems, such as asthmatics.

15 Q. All right, sir, how are ambient air quality
16 standards sustained?

17 A. EPA has to go through a rule-making process where
18 they have to evaluate air quality standards every five years,
19 and this consists of committees that are made up of
20 scientists as well as physicians and doctors who review the
21 latest findings on any scientific research that's been done
22 to determine whether the current standards are adequate or
23 revisions need to be made.

24 Q. Does Florida have ambient air quality standards?

25 A. Yes, they do. Florida has adopted standards, the

1 National Ambient Air Quality Standards, and also has the
2 flexibility to have more stringent standards in, I believe
3 it's Exhibit One, Table 3-1 lists the pollutants for which
4 ambient standards have been set. There are six pollutants
5 and they're referred to as criteria pollutants.

6 Q. How do the Florida ambient air quality standards
7 compare to the federal standards?

8 A. The Florida standards are identical to the annual
9 standards except for sulfur dioxide, where they've adopted
10 more stringent concentrations for 24-hour and annual.

11 Q. As part of your work on this project, did you
12 determine whether the ambient air quality standards currently
13 are being met where the Oleander Power Project will be built?

14 A. Yes, I did.

15 Q. What did you discover?

16 A. I discovered, in fact, the ambient standards in
17 terms of meeting compliance, complying with standards, they
18 are in compliance and that's consistent with what DEP has
19 considered, as well.

20 Q. Could you tell us briefly what that means.

21 A. Generally, that means where ambient air qualities
22 have been established, areas that are less than the ambient
23 standards are considered attainment. Areas that are
24 exceeding or in violation of the standard are non attainment,
25 up in the northeast, for example, pollutants that are non

1 attainment for the pollutant ozone.

2 Q. So this area is in attainment, which means the air
3 quality here is better than the maximum limits allowed under
4 the ambient air quality standards?

5 A. That's correct.

6 Q. What is PSD increments?

7 A. PSD increments are limits that establish the
8 incremental air quality in an area. The amount of PSD is
9 based on the character or the theory is classified according
10 to allowances for increases in air pollutants.

11 Q. Well, how is Brevard County classified under the
12 PSD program?

13 A. Brevard County is classified as a PSD Class Two
14 increment, which allows for moderate increases in air
15 pollution.

16 Q. All right. Did you perform an air quality impact
17 analysis to determine whether the proposed Oleander Power
18 Project would comply with the limits established by the
19 ambient air quality standards and the PSD increments?

20 A. Yes, I did.

21 Q. All right, and what was -- excuse me. Did your
22 analysis comply with the DEP and EPA requirements for such
23 assessments?

24 A. Yes, they did comply with them.

25 Q. Would you describe for us what you did as part of

1 your analysis.

2 A. As part of the analysis, we used methods and
3 methodology recommended for and developed by the U.S. EPA as
4 well as DEP in assessing the air quality assessments for the
5 project. These assessments followed U.S. EPA documentation
6 and air modeling guidelines in terms of models, and using
7 receptors we conformed with what was recommended.

8 Q. You used a standard EPA model?

9 A. Yes, we predicted concentrations with the
10 Industrial Source Complex Short Term Dispersion Model,
11 referred to as ISCSTD 3 model, and that's a model typically
12 used in areas that have gently rolling to flat terrain. It's
13 applicable to point sources or stack emissions such as for
14 the project.

15 And it's specifically recommended for uses by both
16 DEP and EPA for assessments such as the Orlando Power
17 Project.

18 Q. As part of your modeling, did you use any
19 meteorological data?

20 A. We used five years of hourly meteorological data
21 from the Orlando International Airport. And that consisted
22 of meteorological parameters such as wind direction, wind
23 speed, temperature and other parameters that are needed to
24 do the air quality assessment.

25 This particular weather data is recommended

1 specifically by DEP to address the air quality impacts in
2 this county.

3 Q. And did your analysis consider potential impacts in
4 the area surrounding the project?

5 A. Yes, we did. We modeled consistent with the
6 guidelines, what we refer to as receptor locations where we
7 actually located points around the facility. We had more
8 than approximately 500 or more locations out to more than
9 five miles away from the facility.

10 With that, we also used as part of the modeling
11 exercise, which refers to the regulatory default options,
12 which are a series of technical features that must be used in
13 an application such as this particularly for air permitting
14 purposes.

15 Q. Well, does the model account for meteorological
16 events such as inversion?

17 A. Yes, it does. As I mentioned earlier, we used five
18 years of our meteorological data and that includes an --
19 inversion is the occurrence such as a low mix height, or a
20 very small volume of air in which pollutants can be dispersed
21 or trapped and use high concentrations.

22 Since we considered five years, we had more than
23 40,000 weather observations which did include inversions, or
24 low mix heights, to be included in the analysis.

25 Q. Well, based on your analysis in this case, have you

1 formed an opinion as to whether the Oleander Power Project
2 will comply with all of the applicable ambient air quality
3 standards and PSD increments?

4 A. Yes, I've concluded that the Oleander Power Project
5 will comply with all the ambient air quality standards and
6 PSD increments.

7 Q. I'd like you to take Exhibit 20 and explain for us
8 very briefly how you reached your conclusion.

9 A. Exhibit 20 is a summary of the maximum pollutant
10 concentrations predicted for the project. And it shows a
11 series of pollutants in the first column from SO₂, sulfur
12 dioxide, NO₂, nitrogen dioxide, particulate model, PM₁₀, as
13 well as carbon monoxide.

14 And since there are various arching times for the
15 standards, there are also averaging times for the
16 concentrations. For example, for SO₂ we predicted
17 concentrations for both natural gas and oil-fired that
18 consider in the combustion turbines and then compared them to
19 the ambient air quality standards. What it shows is the
20 concentrations predicted for the power plant are well below
21 the standards.

22 Higher impacts are occurring for the oil-firing
23 case.

24 Q. What are EPA significant impact levels?

25 A. The EPA significant impact levels are threshold

1 levels to determine whether more detailed analyses are
2 required for a particular project. If a project's impact's
3 less than significant values, then the project is deemed to
4 provide reasonable assurance.

5 If it's over, then an additional air quality
6 analysis would be needed, for instance, modeling background
7 sources or non project related sources with the project
8 itself.

9 Based on the results shown in this Exhibit, for
10 both the natural gas-fired and oil-fired situations we are
11 below the -- the project is below the significant impact
12 levels.

13 Q. So from a regulatory perspective, if the impacts
14 are below the significance level, that means they are, in
15 effect, insignificant, or not worthy of further evaluation.

16 A. That's correct.

17 Q. All right. I'd like you to take Exhibits 22
18 through 27 and very quickly compare the impacts from the
19 project to the applicable air quality standards and PSD
20 permits.

21 MR. ROWE: That was 22 through 27?

22 MR. DEE: Yes, sir.

23 THE WITNESS: Exhibits 22 and 23 are
24 presenting results that I presented in,
25 had summarized in the earlier Exhibit.

1 Q. -- so small that you can't represent them with a
2 box, it's basically a flat line?

3 A. That's correct.

4 Q. All right, sir.

5 A. That's correct. The second exhibit, Exhibit 23,
6 this compares the air quality impacts from the project to the
7 ambient air quality standards and PSD increments. What this
8 indicates is that for sulfur dioxide concentrations, the
9 project's impact is less than .6 of the ambient air quality
10 standards and less than two percent of the PSD increment.

11 The next set of Exhibits, Exhibits 24 and 25, show
12 the similar comparison of particulate matter to ambient
13 predictions for the project. And again, the information is
14 presented for the project in comparison to the ambient air
15 quality standard and PSD Class Two increment. There's a very
16 thin bar compared to the ambient air standards or Class Two
17 increments.

18 Exhibit 25 shows the percent of the standards. And
19 for particulate matter they were less than .2 percent of the
20 ambient air quality standards and about 1.1 percent, or less
21 than the PSD Class Two increments.

22 Q. And are 26 and 27 similar?

23 A. Yes, they are.

24 Q. They present information for nitrogen dioxide and
25 for --

1 A. Nitrogen dioxide in Exhibit in 27, it's showing
2 that the project impacts .3 percent of the ambient standard
3 and 1.2 percent of the PSD Class Two increment.

4 Q. All right, sir, you've told us what the analysis
5 indicated. Is your analysis likely to over estimate or under
6 estimate the potential impacts on the Oleander Power Project?

7 A. Our results are conservative. They're likely to
8 over estimate, because of the way the modeling was performed.

9 We assumed for the maximum impacts that we would be
10 firing the oil for the entire year when, in fact, oil would
11 be limited to about 1,000 hours.

12 Also, the model also considered natural gas
13 emissions to occur for the entire year, as well, when, in
14 fact, this will be limited to 3,390 hours during the year.

15 When we considered that we used five years of
16 hourly meteorological data which, again, is more than 40,000
17 weather observations or combinations of weather events, the
18 likelihood that the plant would be operating under the worst
19 case meteorologically under oil or gas is low.

20 Q. How do the air impacts for natural gas compare to
21 the impacts when firing oil?

22 A. The impacts for natural gas were approximately two
23 to five times lower than those for oil.

24 Q. But your maximum impact assessments are all based
25 on firing oil.

1 A. That's correct.

2 Q. All right. Now, you've told us that you use very
3 conservative analyses, you've told us that the project's
4 maximum impacts are all less than one percent of the
5 applicable ambient air quality standards and you've told us
6 that the ambient air quality standards are designed to
7 protect human health and welfare. Given those facts, what
8 conclusions can you draw regarding the project's potential
9 impacts on human health and welfare?

10 A. Well, regarding human health and welfare, the
11 project's impacts, there's a wide margin of safety in terms
12 of air quality impacts.

13 Q. Well, did you consider the possibility, as Mr. Rowe
14 has mentioned with earlier witnesses, that the impacts from
15 this project may be combined with the impacts of other
16 facilities in this region?

17 A. Yes, we did, although we weren't required to.

18

19

(End Volume I)

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C E R T I F I C A T E

STATE OF FLORIDA)
)
COUNTY OF BREVARD)

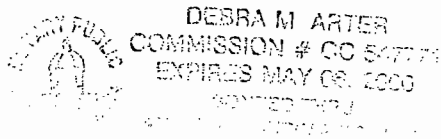
SS:

I, DEBRA M. ARTER, Registered Diplomate Reporter
and Notary Public in and for the State of Florida at Large,

DO HEREBY CERTIFY that the above-entitled and
numbered cause was heard as hereinabove set out; that I was
authorized to and did stenographically report the proceedings
and evidence adduced and offered in said hearing, and that
the foregoing and annexed pages, numbered 5 through 199,
inclusive, comprise a true and correct transcription of
Volume I of the proceedings in said cause.

I FURTHER CERTIFY that I am not related to or
employed by any of the parties or their counsel, nor am I
interested in the outcome of this action.

SWORN TO AND SUBSCRIBED by me this 1st day of
September, 1999.



DEBRA M. ARTER
Registered Diplomate Reporter

1 offered by Oleander?

2 A. The conditions that are identified in that
3 Stipulated Settlement Agreement include hours of operation,
4 hours of operation on fuel oil, limitations with respect to
5 truck traffic, limitations with respect to odor and vibration
6 and noise.

7 It also includes a requirement to assist the City
8 in developing the infrastructure that I just mentioned
9 regarding storm water as a supplement to the reclaimed water
10 supply.

11 Q. Why did Oleander offer to accept these restrictions
12 on its Plan of Development?

13 A. Well, they weren't required under the current Land
14 Development Code for Brevard County to limit their facility
15 in the manners that I just described. There have been a
16 number of studies that Golder has conducted since the
17 project's inception that showed that we could demonstrate
18 compliance with those types of conditions.

19 And because those conditions were a source of
20 concern to, to the local residents in the community, most of
21 those conditions were offered by Oleander as an incentive to
22 develop the project in a manner that is reasonable and
23 minimizes environmental impact.

24 Q. All right, sir.

25 A. As part of your work on this project, did you

1 evaluate the project's impact on minority and low-income
2 neighborhoods?

3 MR. GOORLAND: Your Honor, at this point,
4 if I may, I have an objection I'd like to
5 raise, and it may take one or two minutes.

6 JUDGE: Go ahead.

7 MR. GOORLAND: In the preliminary matters,
8 Mr. Dee withdrew his Motion to Strike regarding
9 the environmental justice issue. And he
10 stated that he'd like to do so because he'd like
11 to make a record of Oleander's relationship
12 with the community.

13 The Department has no objection and had
14 no objection to his withdrawal for those
15 purposes.

16 However, if you recall, I did state
17 for the record our opinion about the
18 environmental justice issue. At this point,
19 I would like to state that if Mr. Dee's
20 line of questioning is for the purpose of
21 showing any relationship with the community
22 that Oleander may have, I have no objection
23 to that line of questioning throughout this
24 witness or any other witness.

25 However, if Mr. Dee intends to propose

1 any line of questioning for the purpose of
2 determining whether environmental justice
3 played a role or should play a role in the
4 Department's issuance of the permit or your
5 determination in that matter, then I would
6 raise an objection and would raise it as
7 a standing objection to any of those.

8 JUDGE: Mr. Dee?

9 MR. DEE: Yes, sir. This line of
10 testimony is intended to demonstrate that
11 Oleander has attempted to address the
12 concerns of the community. It is also
13 intended to demonstrate that if
14 environmental justice issues are legally
15 relevant to this proceeding, we have,
16 indeed, addressed those concerns and
17 demonstrated that those concerns are not
18 well founded.

19 We agree with the Department that
20 environmental justice issues appear to
21 be legally irrelevant to this case.
22 However, the law in this area is unclear.
23 There is certainly the opportunity for
24 someone to come in on appeal and challenge
25 a determination at this juncture that no

1 testimony should come in on environmental
2 justice issues.

3 If you were to rule that no evidence
4 could come in now, there is the potential
5 that on appeal, if we were to lose that
6 issue, the case would be remanded and we
7 would be back here at a later date to
8 take testimony on the issue. We would
9 prefer to address it now once and for
10 all and be done with it.

11 So for that reason, we would like
12 to have the opportunity to put the evidence
13 in the record. We intend to argue in our
14 Proposed Recommended Order that on the
15 merits there is no violation of any
16 environmental justice concerns. However,
17 legally they're not relevant, but if
18 they were relevant and you considered
19 them or the Department considers them
20 on the merits we've addressed.

21 JUDGE: The problem with that is
22 my recollection is, correct me if I'm
23 wrong, but I think in response to your
24 initial Motion to Dismiss I've already
25 ruled on that issue.

1 MR. DEE: In response to the initial
2 Motion to Dismiss, you ruled that our
3 Motion was moot because you dismissed
4 the initial letter that was filed by Mr.
5 Rowe and you gave him the opportunity to
6 file an Amended Complaint.

7 JUDGE: But it was on that ground,
8 wasn't it, the environmental justice ground?

9 MR. DEE: No, sir. The initial
10 question is whether Mr. Rowe had satisfied
11 his pleading obligations. The decision
12 was that, no, he had not.

13 So you instructed him to file a new
14 Petition.

15 JUDGE: Wait a minute --

16 MR. DEE: You also at that time, Your
17 Honor, advised me that my Motion to Dismiss
18 on environmental justice grounds was moot
19 because you had already dismissed the
20 Petition.

21 We agreed, but I then asked you to
22 instruct Mr. Rowe about environmental
23 justice issues in the hope that we wouldn't
24 have to continue to pursue this concern.

25 Mr. Rowe has made it clear -- not only

1 has he replied, but he has continued to make
2 it clear in his deposition that he wants
3 to pursue this issue with EPA and the
4 Department of Justice.

5 And we're simply trying to address
6 the issue now on the facts and we intend
7 to address it legally, as well, in our
8 post hearing submittals. To ensure that,
9 whether it's relevant or not, we've
10 addressed the merits of his concern.

11 JUDGE: The Order granted the Motion
12 to Dismiss and it rendered the Motion to
13 Strike moot.

14 MR. DEE: Yes, sir.

15 JUDGE: The Motion to Dismiss has
16 stated as one of its grounds that Petition
17 allegedly, made allegations of environmental
18 injustice, over which this forum has no
19 jurisdiction.

20 MR. DEE: That was the allegation we
21 raised. You never got to the merits of
22 that allegation because you ruled that the
23 pleading was insufficient as a matter of
24 law.

25 JUDGE: Okay. Anything further, Mr.

1 Goorland?

2 MR. GOORLAND: Yes, Your Honor, I'm
3 looking back through the record, and the
4 Order granting the Motion to Dismiss --
5 I don't think it makes it clear in here
6 whether or not it was based on the
7 environmental justice issue. And I was
8 not -- I was not part of that discussion,
9 at the time I was not part of this.

10 However --

11 JUDGE: What is the Agency's position
12 on jurisdiction on environmental justice?

13 MR. GOORLAND: The Agency's position
14 is that the environmental justice is not
15 part of our permitting jurisdiction and,
16 therefore, it is not an issue that should
17 be considered as part of whether or not
18 the permit should be issued, and it should
19 not be part of your consideration as to
20 whether or not the Department should have
21 issued or should issue the permit in your
22 recommendation.

23 And I would ask that any line of
24 questioning -- I would object to any line
25 of questioning based on those specific

1 purposes. But again, I will say I have
2 no objection if they wish to show the
3 relationship with the community.

4 JUDGE: Mr. Rowe, any response on
5 the objection?

6 MR. ROWE: I would request that it
7 remain as a part of the Complaint as stated.

8 JUDGE: Okay. Well, we're -- that's
9 not at issue.

10 MR. ROWE: It's not? Okay.

11 JUDGE: The issue is there's an
12 objection to a specific question.

13 MR. GOORLAND: And it's a standing
14 objection, Your Honor, to a line of
15 questioning.

16 JUDGE: Anything further, Mr. Rowe?

17 MR. ROWE: No, sir.

18 JUDGE: The objection is sustained.

19 MR. DEE: Your Honor, may we proffer --

20 JUDGE: Yes --

21 MR. DEE: -- is the testimony?

22 JUDGE: -- you certainly may.

23 MR. DEE: All right.

24 JUDGE: Note for the record when
25 you're completed with the proffer.

1 MR. DEE: Yes, sir.

2

3

PROFFERED DIRECT EXAMINATION

4

BY MR. DEE:

5

Q. Mr. Zwolak, did you perform an assessment of
6 whether this project would cause adverse impacts on minority
7 and low-income neighborhoods?

8

A. Yes, I did.

9

Q. And why did you perform this work?

10

A. During the spring of 1998, we were conducting a
11 visual impact assessment. And part of the requirements of
12 that methodology was to drive all public rights-of-way within
13 a several-mile radius of the project site.

14

It was at that time that we noticed that there was
15 a community south of State Road 520 that had a racial
16 minority.

17

So I disclosed our discovery to Oleander and
18 suggested that they conduct a study, and they immediately
19 authorized us to proceed.

20

Q. What criteria did you use when trying to determine
21 whether the project would adversely affect any minority or
22 low-income neighborhoods?

23

A. Well, we initially looked at the Executive Order
24 dealing with environmental justice, that's Executive Order
25 1898, Federal Actions Affecting Environmental Justice in

1 Racial Minority Populations and Low-Income Populations. We
2 applied those criteria in addition to traditional
3 environmental impact assessment methodology to come up with
4 our conclusions.

5 Q. All right, sir, and have you formed an opinion as
6 to whether the Oleander Power Project will cause any adverse
7 impact on any minority or low-income neighborhoods?

8 A. I have formed an opinion, yes.

9 Q. What is your opinion, sir?

10 A. It is my opinion that the proposed Oleander Power
11 Project will not adversely affect any racial minority
12 population or low-income population or, for that matter,
13 any population in the vicinity of the project site.

14 Q. Let's talk about the basis for your opinion.
15 Where is the nearest minority or low-income neighborhood?

16 A. That neighborhood is situated south of State Road
17 520, and if I can refer to one of the Exhibits --

18 Q. Certainly.

19 A. -- I'll refer to the applicant's Exhibit 46. I've
20 already used this Exhibit to identify the nearest residential
21 areas to the project site. The racial minority neighborhood
22 is located to the south of State Road 520 and also to the
23 east of I-95. It is actually south of and is not depicted to
24 any great extent on this Exhibit.

25 Q. How far is it from the site to the nearest

1 residence in the minority neighborhood you're referring to?

2 A. Approximately 2,400 feet.

3 Q. Is there anything between the project and that home
4 that would serve as a buffer?

5 A. Yes, there are a number of areas of vacant land.

6 There are also a number of commercial businesses that are
7 both north and south of 520. Then there's the State Road 520
8 itself.

9 Q. Where is Mr. Rowe's home located in relation to the
10 site?

11 A. His home, I believe, if it's on Pennsylvania
12 Avenue, I've looked at maps and Pennsylvania Avenue is
13 between, I think, three and four miles southeast of the
14 project site.

15 Q. So it's even further away than the minority
16 neighborhood you referred to.

17 A. Absolutely, yes.

18 Q. All right. Now, in the nearest minority
19 neighborhood, will the residents be able to see the proposed
20 Oleander Power Project after it's been built?

21 A. They will not.

22 Q. Will they be able to hear it?

23 A. They will not be able to hear it under normal
24 conditions, no.

25 Q. Will there be any truck traffic through their

1 neighborhood?

2 A. No, there aren't any highways that the trucks would
3 use to access the Oleander site through the neighborhood.

4 Q. Would there be any direct or physical disruption of
5 that community?

6 A. No. All of the interconnections that Oleander will
7 require for either fuel supply or water or sanitary service
8 or reclaimed water service will be located in close proximity
9 of the site and not near this community.

10 Q. Would there be any indirect effects on the
11 well-being of that minority community?

12 A. The effects of the project do extend up to several
13 miles beyond the project site, as indicated by our air
14 quality analysis.

15 Q. Let's set aside air quality just a second.

16 A. Okay.

17 Q. Are there any other impacts this project would have
18 on the minority neighborhood that would adversely affect its
19 well-being?

20 A. No.

21 Q. All right, sir. What about communities that are
22 located further away from the project?

23 A. There would be even less of an impact, which means
24 there would be no disruption at all to those communities.

25 Q. Now, you mentioned potential air quality impacts.

1 Have you tried to determine where the maximum air quality
2 impacts from this project will occur?

3 A. Yes.

4 Q. All right. Approximately how far from the site
5 will those impacts occur?

6 A. They vary, depending upon the parameter that's
7 evaluated. The maximum impacts range anywhere from .25 miles
8 to .24 miles.

9 Q. All right, I'd like you to turn to Exhibit 33 and
10 look at Table 3 and explain the analysis that you performed
11 concerning the project's air quality impact on minority and
12 other neighborhoods.

13 A. Exhibit 33 is a report entitled Environmental
14 Justice Assessment Constellation Power Development, Inc.,
15 Oleander Power Project. Table 3 is found on Page Six.
16 And -- just one page from the back of the report.

17 And it identifies for each air quality parameter
18 the direction and distance of the maximum concentration. It
19 identifies the value of that concentration, its comparison to
20 state ambient air quality standards.

21 And it also identifies the racial characteristics
22 of that location as defined by census tract, block group
23 data.

24 Q. Can you summarize the findings that are found in
25 that Table?

1 A. Yes, in summary, the most significant concentration
2 of air emission from the proposed project would be .6 percent
3 of the State's ambient air quality standard.

4 The evaluation also identifies that for the one
5 parameter whose worst case falls within the community to the
6 southeast of the site, that concentration would be one
7 twentieth of one percent of the State's ambient air quality
8 standard.

9 Q. So you looked at eight scenarios and seven of the
10 situations that you evaluated the maximum impacts occurred in
11 communities that are not minority communities?

12 A. That is correct. With the one exception of the,
13 one of the eight parameters, the percent minority as
14 determined by the census bureau is anywhere from 0 percent to
15 2 percent minority population.

16 Q. So if the maximum impacts occur in non minority
17 communities out of seven out of eight scenarios, what
18 conclusions can you draw as to whether the project will have
19 a disproportionate impact on minority neighborhoods?

20 A. This evaluation suggests that there would not be
21 any disproportionate impact on minority populations.

22 Q. Now, you've mentioned that you've compared these
23 maximum impacts to ambient air quality standards. Do you
24 know whether those standards are designed to protect human
25 health and welfare?

1 A. They are, they're designed to protect human health
2 and welfare for all citizens. That would include young and
3 old, as well as those that are less healthy due to other
4 types of medical problems.

5 Q. If the maximum impacts in all cases are less than
6 one percent of the applicable standard, what conclusions did
7 you draw concerning the project's impacts on air quality and
8 the populous in Brevard County?

9 A. I would conclude that there is negligible impact of
10 the proposed project on all of the residents of Brevard
11 County.

12 Q. All right, sir. Now, you've referred to Exhibit
13 Number 33.-

14 A. Yes.

15 Q. To the best of your knowledge, are the statements
16 contained in that Exhibit true and correct?

17 A. They are.

18 Q. And do you adopt those statements as part of your
19 testimony today?

20 A. I do.

21 Q. Have you ever prepared similar environmental
22 assessments before concerning environmental justice issues?

23 A. Yes, I have.

24 Q. And were your findings in those cases accepted by
25 the appropriate regulatory agencies?

1 title on that document?

2 MR. DEE: Yes, it's marked as Exhibit
3 32.

4 JUDGE: It's just mismarked.

5 MR. DEE: Yes, Sir, there may be some
6 confusion. On Friday we were shipping our
7 Exhibits to Mr. Rowe from our office in
8 Tallahassee. Golder was separately shipping
9 documents, I guess, on Thursday, actually,
10 was separately shipping documents to Mr.
11 Rowe from their office. So there may have
12 been some confusion in the transmittal
13 letter sent by Golder.

14 JUDGE: As to any confusion in the
15 identification of Exhibits, Oleander Power
16 Project's Amended Exhibit list filed today
17 here in the record controls the
18 identification of any of Oleander's Exhibits.
19 Do you have a copy of that, Mr. Rowe?

20 MR. ROWE: I think so.

21 JUDGE: Do you have a copy of that,
22 Mr. Goorland?

23 MR. GOORLAND: I have a copy of it.

24 JUDGE: Okay.

25 MR. DEE: Mr. Zwolak, if you would

1 give me the Amended Exhibit List that's
2 in that file that you have. Let me give
3 that to Mr. Rowe at this time to, hopefully,
4 eliminate any confusion.

5 And Mr. Rowe, just, again, to eliminate
6 any confusion, you were sent documents
7 directly by Golder?

8 MR. ROWE: Uh-huh.

9 MR. DEE: Those documents did not have
10 exhibit numbers on them. Let me give you a
11 new set of those same Exhibits with the
12 exhibit numbers attached.

13 MR. ROWE: Okay, very good.

14 MR. DEE: Yes, sir.

15 JUDGE: Ask your next question.

16 MR. DEE: Thank you, sir.

17 BY MR. DEE:

18 Q. Mr. Zwolak, you had previously discussed Exhibits
19 35, 36, 45 and 46. 35 was the artist's rendering, 36 was the
20 site location map, 45 was the Site Development Plan and 46
21 was the aerial photograph. With regard to all of these
22 Exhibits, do they accurately depict the site and Oleander's
23 plans for the site?

24 A. Yes.

25 Q. Do all of these Exhibits supplement and help

1 explain the testimony you've provided this morning?

2 A. They do.

3 Q. Do you know whether there have been any public
4 meetings to discuss this project prior to today's hearing?

5 A. Yes.

6 Q. Do you know -- can you identify some of those
7 meetings for us?

8 A. Yes, I can. In a general context, there have
9 been two DEP public hearings regarding the PSD application.
10 DEP -- Oleander on its own accord conducted eight public
11 meetings in various locations throughout Brevard County,
12 beginning in, with the project announcement in November of
13 1998 and going till just the recent past.

14 The project mailed over 16,000 questionnaires to
15 residents of Brevard County, the central area of Brevard
16 County. And Oleander also placed 20 advertisements in
17 various newspapers throughout the community of various sizes
18 from, I'd say, about a half a page down to smaller legal
19 notices.

20 Q. Has the County conducted any public meetings
21 concerning this project?

22 A. Yes, there have been a number of times when the
23 project has come before the Board of County Commissioners and
24 the local planning agency in Brevard County. In addition,
25 the County had several workshops regarding the settlement

1 agreement.

2 Q. All right. Do you know whether the DEP meetings
3 concerning the PSD permit in this case were published, notice
4 was published, I'm sorry?

5 A. I have seen the public notices, yes, sir.

6 Q. All right, sir. I'd like you to look at Exhibits
7 7, 8, 12, if you'll just flip through there, 7, 8, 12, 17,
8 and 31.

9 A. I've reviewed them.

10 Q. All right, do these Exhibits contain the notices
11 that were published by DEP and Oleander to inform the public
12 about this project?

13 A. Yes, they include the Agency's public notices, the
14 Applicant's public notice for the issuance of the draft
15 application, as well as the other advertisements that I
16 mentioned.

17 Q. All right, sir. Did you attend the DEP
18 meeting that was held on March 3, 1999, for discussion of
19 this project --

20 A. I did.

21 Q. -- by DEP? And approximately how many people
22 attended that meeting?

23 A. I counted approximately 80 in attendance.

24 Q. And approximately how long did the meeting last?

25 A. It was a little bit over two hours in duration.

1 Q. Was the public given an opportunity to submit oral
2 and written comments at the DEP meeting on March 30?

3 A. Yes, that was expressed by DEP both at the
4 beginning of the meeting and at the end.

5 Q. All right, as part of your work on this project,
6 have you determined whether Oleander and DEP have satisfied
7 the applicable DEP requirements for the publication of public
8 notice and providing an opportunity for public participation
9 in this case?

10 A. Yes, I was personally responsible for seeing that
11 the notice was placed in the appropriate newspaper.

12 Q. So the DEP notice requirements have been satisfied?

13 A. Yes.

14 Q. All right. Now, I'd like you to take a look at
15 Exhibit 34. Tell me whether that is the Stipulated
16 Settlement Agreement that was signed by Brevard County and
17 Oleander.

18 A. It is a complete and executed copy.

19 Q. Does Exhibit 34 accurately describe the land use
20 restrictions that have been accepted by Oleander for the
21 development of this project?

22 A. They do, yes.

23 Q. Do the statements in Exhibit 34 supplement and
24 explain your prior testimony concerning the restrictions that
25 have been accepted for this project?

1 A. Yes, they do.

2 MR. DEE: Your Honor, at this time
3 I'd like to move the following Exhibits
4 into evidence:

5 JUDGE: Go ahead.

6 MR. DEE: 7, 8, 12, 16, 17, 31, 33, 34,
7 35, 36, 45 and 46.

8 MR. GOORLAND: Your Honor, I'd object
9 to Exhibit 33.

10 JUDGE: Mr. Rowe, any objection?

11 MR. ROWE: No, sir.

12 JUDGE: Exhibits -- Oleander Exhibits 7,
13 8, 12, 17 --

14 MR. DEE: 16.

15 JUDGE: -- 16 --

16 MR. DEE: And 17.

17 JUDGE: Okay, let's start over.

18 MR. DEE: Yes, sir.

19 JUDGE: Oleander's Exhibits 7, 8, 12, 16,
20 17, 31, 34, 35, 36, 45 and 46 are admitted in
21 evidence without objection.

22 Mr. Dee, Oleander's 33 was part of the
23 proffer?

24 MR. DEE: That's correct, Your Honor.

25 JUDGE: Are you now submitting it for

1 admission?

2 MR. DEE: I'll try again, yes, sir.

3 JUDGE: And the Department's objection
4 is sustained. Oleander's 33 is proffered
5 only.

6 MR. DEE: All right, sir.

7 JUDGE: The Motion to admit it is
8 objected to and sustained. Ask your next
9 question.

10 MR. DEE: Yes, sir.

11 (Whereupon, Respondent's Exhibits 7, 8, 12, 16,
12 17, 31, 34, 35, 36, 45 and 46 were marked and received in
13 evidence.)

14 BY MR. DEE:

15 Q. Mr. Zwolak, you heard the testimony or the comments
16 that were offered by the public this morning. Did Oleander
17 perform an environmental assessment of the project's impacts
18 on wetlands and wildlife?

19 A. Yes.

20 Q. And what was the conclusion of that assessment?
21 Excuse me, what was done, first?

22 A. The work that Golder conducted on ecological
23 aspects of the site and eventually leading to an impact
24 assessment of what the effect of the project would be began
25 in 1996.

1 We had a mid level ecologist on site to conduct
2 both a wetlands determination and a threatened and endangered
3 species review.

4 Since that time, our project ecologist has been
5 on site a number of times and he has been vigilant to
6 maintain an appearance for threatened and endangered species.
7 He's always looking to see if there would be any threatened
8 and endangered species or species of concern that the project
9 would impact.

10 His findings were that there were none observed on
11 the site at any time during any of the site visits.

12 We also to supplement his work had one of our
13 senior wildlife ecologists, a gentleman with 20 years'
14 practice in the State of Florida, he holds an M.D., a Ph.D
15 degree, he reviewed the work as well as conducted his own
16 independent evaluation and found that the project would have
17 no impacts on threatened and endangered species.

18 Q. Or species of special concern?

19 A. Or species of special concern.

20 Q. Have you considered the possibility that birds will
21 fly over the power plant while it is operational and be
22 incinerated?

23 A. That was part of the evaluation that our Ph.D
24 wildlife ecologist reviewed, yes.

25 Q. And what was the conclusion of that review?

1 A. His findings were that in his professional career,
2 he had never come across that incidence to occur.

3 Q. So he does not expect that to occur in this case?

4 A. Correct, correct. Given the absence of species on
5 site, where threatened species might be, the known corridors
6 in Brevard County, and where the site is located, he would
7 expect that that would not occur, there would be no impact
8 from migration as well as occupancy on the site.

9 Q. As a land use planner, have you considered whether
10 this development is compatible with surrounding land uses?

11 A. Yes, I have.

12 Q. And what is your conclusion concerning that issue?

13 A. That the proposed project is compatible with the
14 immediately adjacent land use, that being
15 industrial/commercial. It is also compatible with the
16 residential uses that are quite some distance away from the
17 industrial/commercial area.

18 Q. Have you considered the potential impacts
19 associated with truck traffic going to and from the site?

20 A. Yes.

21 Q. Could you summarize your conclusions concerning
22 truck traffic.

23 A. During the middle portion of 1998, we conducted a
24 traffic impact assessment that evaluated the ability of the
25 existing infrastructure, this being primarily State Road 520,

1 to accommodate both construction and operation traffic during
2 the a.m. and p.m. peak hours.

3 And we found that the, both State Road 520 and
4 Townsend Road operate at a very high level of service. That
5 level of service would be an indicator of a lack of
6 congestion both with and without the project.

7 Supplementing that work, we also evaluated the
8 entire route alternatives from the Port of Cape Canaveral to
9 the project site to determine if specifically fuel oil trucks
10 would have an impact, an adverse impact on the highway
11 corridor.

12 Q. In the course of your work on this project, have
13 you formed a professional opinion as to whether the PSD
14 permit -- excuse me, have you formed a professional opinion
15 as to whether the PSD satisfies the DEP criteria for the
16 issuance of the PSD permit?

17 A. As Project Manager, I relied on my resource staff
18 who developed the draft documents which I reviewed and
19 approved during the course of the project.

20 Q. What is that opinion?

21 A. My opinion is that the proposed project does comply
22 with the applicable standards.

23 Q. You heard the public comments that were offered
24 this morning. Was there anything said this morning that
25 would change your opinion concerning the issuance of the PSD

1 permit for this project?

2 A. It would not.

3 Q. All right, sir.

4 MR. DEE: I have no further questions.

5 JUDGE: Does the Department have any

6 further Direct?

7 MR. GOORLAND: No, sir.

8 JUDGE: How long will your -- let's go
9 off the record.

10 (Whereupon, discussion was held off the
11 record.)

12 JUDGE: Let's go back on the record.

13 Cross.

14

15 CROSS EXAMINATION

16 BY MR. ROWE:

17 Q. You made comments in reference to noise under
18 normal conditions.

19 A. Yes.

20 Q. If it's not going to be heard under normal
21 conditions, what conditions would it be heard?

22 A. If there was a, an absence of ambient noise levels,
23 for instance, if all the vehicular traffic on all the roads
24 in, surrounding the site were to stop and all the industrial
25 and commercial activities were to stop and you would have

1 very close to an absence of noise levels, then you would
2 possibly be able to hear the project under certain
3 meteorological conditions.

4 Q. So basically what you're saying is that there will
5 be some noise heard, and you're saying that that noise would
6 be normal noise.-- Is that what you're saying?

7 A. Well, there would be some sound that might be
8 detected by certain individuals, if they're drawn to it,
9 based on whatever activity that they're doing.

10 Our analysis that we conduct evaluates what a
11 proposed source of noise would contribute to an existing
12 situation. And under a scenario where you don't have noise,
13 then, yes, you might be able to hear the project where,
14 otherwise, you would not hear it.

15 Q. Have these analyses been duplicated or can this
16 be duplicate and, if so, who duplicated them, other than your
17 association?

18 A. Well, we have staff that conducts both noise
19 monitoring and noise modeling at Golder. And they worked
20 under my direction to conduct both the monitoring and the
21 modeling activities.

22 Being a model, a predictive model, yes, it can be
23 duplicated.

24 Q. I mean, have you -- has that been tested or has --
25 is the formula available so that if an independent tester

1 wanted to duplicate your findings, that it could be done?

2 A. They could.

3 Q. Is it in the exhibits?

4 A. No, the noise analysis was not required by any
5 regulatory agency, it was something that Oleander undertook
6 just to confirm that there would not be a noise problem or,
7 if there was a noise problem, to determine what would be
8 necessary to rectify that problem.

9 Q. Based on the comments of, public comments and the
10 concerns that were had to you, what was it, five turbo
11 engines, they make a drastic amount of noise, would they not?

12 A. No.

13 Q. I never heard one.

14 A. No, they are designed to operate in quiet mode. By
15 that, they have certain design features either built into the
16 turbine themselves or the enclosure that would minimize noise
17 levels to a certain level.

18 Those requirements are not mandated by the local
19 government, which normally is the agency that regulates noise
20 level, but by OSHA.

21 Q. Is there -- I mean, do you have, based on your
22 analysis, do you have any estimate as far as what kind of
23 noise level you're talking about?

24 A. Yes, the GE 7FA combustion turbine, which is what
25 Oleander proposes to use, comes with a guarantee of 95

1 decibels at three foot from the source. So using that
2 information, we can predict what the noise levels will be at
3 various distances based on different operational scenarios.

4 And that is what we used to come up with our
5 conclusion regarding, A, the need to -- the need to meet the
6 proposed county requirements that are now part of the
7 Stipulated Settlement Agreement and then, B, to see if there
8 might be a nuisance noise level that might need to be
9 mitigated by Oleander, just as a good neighbor policy.

10 Q. You also testified that there would be a number of
11 trucks moving in and out with the oil.

12 A. Yes.

13 Q. What kind of noise factor would that contribute to
14 the decibels, if any?

15 A. It would contribute very little. And I base that
16 comment on the fact that during a typical operational
17 scenario for State Road 520, there are about 100 trucks a
18 day -- excuse me, an hour that will pass through that
19 intersection.

20 Under the rare occasion where Oleander uses fuel
21 oil, they will contribute to that truck traffic to the amount
22 of four to six trucks per hour.

23 Because the ambient level is so high, with all the
24 existing traffic that's already there, the incremental
25 increase would not be very detectable.

1 concentrated reused water. It would be the minerals that are
2 already in the water supply that is available to, to county
3 residents.

4 Q. You're saying that once you run that water through
5 your cycle, it won't pick up any kind of pollutants in
6 washing and cleaning your equipment as far as maintenance is
7 concerned?

8 A. Well, with respect to the water treatment aspects,
9 filtering of water and stuff, that's where the concentration
10 of minerals would occur. There may be some operations where
11 you take water and use it for wash water.

12 That would be routed to a oil/water separator.
13 That waste stream, that waste water stream would be routed
14 to an oil/water separator to separate any oily residue or
15 pollutants from the water before it went to an on-site
16 working tank and eventually then will discharge to the City
17 of Cocoa.

18 Q. In reference to the monitoring of the air, your
19 company has suggested that there was no need to monitor the
20 air, even though the citizens had requested it, requested
21 during public hearing that a monitor be set up in order to
22 ensure the quality of air as it was prior to the company
23 going in. You recommended that not be done.

24 How far is the two monitoring stations that is
25 in existence right now?

1 MR. DEE: Your Honor, if I could at
2 this time, I would suggest that a different
3 witness will be addressing those issues.

4 And it may be more appropriate, Mr.
5 Rowe, if you would like to hold those
6 -questions for a few moments --

7 MR. ROWE: I can do that.

8 MR. DEE: -- and address it to someone
9 else.

10 MR. ROWE: I can do that.

11 JUDGE: Okay, ask your next question.

12 BY MR. ROWE:

13 Q. Getting back to those 400 hours and that scenario,
14 is that for sure that that's going to happen? I mean, how do
15 you check that? I understand what you're saying, but is
16 there a requirement that these things be checked and
17 maintained as far as documents or audit trail or something?

18 A. Well, there are certainly a number of regulatory
19 requirements that would be imposed by DEP during the course
20 of operation of the plant to monitor its performance, from
21 emissions monitoring to water consumption.

22 Now, in that case, it wouldn't be DEP that
23 monitors, that would be the Water Management District.

24 So there will be many means by which Oleander will
25 have to maintain records and supply documents to demonstrate

1 compliance with the applicable regulatory programs.

2 Q. Based on your testimony here today, you're saying
3 that you're only going to use oil for a specified period of
4 time.

5 A. Correct, that is only when natural gas is not
-6 available. If it's available for 365 days a year during any
7 given calendar year, then there would not be any fuel oil
8 burned during that period of time.

9 Q. And you will maintain a record of the number of
10 hours that you're burning this oil in reference to -- because
11 oil does produce some type or form of pollutant, does it not?

12 A. It does have emissions, yes, and the DEP draft
13 permit requires specific monitoring requirements, including
14 fuel use. I might add it also requires us to monitor the
15 quality of the fuel oil to make sure it is effective.

16 Q. Is that your better grade of oil or is that second
17 or -- where is that as far as quality is concerned?

18 A. To my knowledge, that's the best grade that's
19 commercially available.

20 Q. And how much oil -- you have how many tanks, two
21 tanks?

22 A. Two tanks, yes.

23 Q. And how much oil do those tanks hold?

24 A. They each hold 2.8 million gallons.

25 Q. So let me ask a hypothetical question here. If you

1 filled them up today and that you were burning gas, would
2 there be any need for those trucks to be running backwards
3 and forwards refilling those tanks and storing that oil?

4 A. No, once the tanks are full, there would be no
5 truck traffic at all associated with fuel oil deliveries,
6 unless fuel oil needed to be used.

7 Q. About how long would you say it would take
8 to -- I'm trying to get a general idea. You said, I think,
9 six trucks an hour or something of that nature.

10 A. Yes.

11 Q. About how long would it take to fill one of those
12 tanks?

13 A. I can offer you an answer with respect to the
14 ability of the project to consume fuel. Those tanks are
15 designed to provide fuel for a continuous burn for all of the
16 units for a 72-hour period.

17 It would take longer to fill those tanks than 72
18 hours. So I can't tell you whether it's four days or five
19 days, but it's certainly greater than three. That in and of
20 itself possesses a limitation on fuel oil use.

21 Q. But if you had to burn the oil, based on the type
22 of consumption that you're talking about, you could have
23 trucks running on a regular -- looks like to me for about a
24 half a year, if not more, trying to keep those things filled,
25 based on the fact you're going to be --

1 A. No, no, there's an annual limitation of 1,000
2 hours. So the project could only run 1,000 hours before it
3 would cease to operate on fuel oil.

4 Q. Uh-huh. I think the Fish and Wildlife Game, is
5 that a Government agency?

6 A. Well, there's Florida Game and Fresh Water Fish
7 Commission and then U.S. Fish and Wildlife Service. So the
8 terms are --

9 Q. U.S. Fish and Wildlife Game (sic), is that a
10 Government agency?

11 A. Yes, it is.

12 Q. And it appears to me that I read somewhere where
13 information was sent to them and they required that -- excuse
14 me, I have no expertise in what I'm trying.

15 I think you were burning, not burning but it had
16 something to do with a maximum of 42 parts and they
17 recommended that you only utilize 25?

18 A. Correct.

19 Q. However, according to the condition of the permit,
20 it appears that your association failed to heed to that
21 recommendation of that requirement.

22 A. That's going to be addressed in other testimony
23 this afternoon.

24 MR. DEE: By the next witness, yes,
25 sir.

1 MR. ROWE: Okay.

2 BY MR. ROWE:

3 Q. Have you ever designed or did additional, other
4 work for Oleander Power Plant in reference to cycle
5 facilities, combined cycle facilities?

6 A. Not combined cycles, no. Simple cycle, yes.

7 Q. What kind of cycle?

8 A. Combined cycle, similar to that proposed by
9 Oleander, yes, I have.

10 Q. Yes, you have. Where were those designed compared
11 to the location?

12 A. Those were located in Perryman, Maryland.

13 Q. Were there any problems in reference to meeting
14 regulatory requirements in reference to those plants?

15 A. No, the permit applications were submitted. The
16 permits were received, the plant has been constructed and,
17 to my knowledge, is operational successfully in compliance
18 with environmental standards.

19 Q. How close are those plants in reference to a
20 residence area?

21 A. Well, the closest community is Perryman itself,
22 which might be a quarter mile or more, perhaps upwards to
23 about a half mile from the project site.

24 Q. Did the residents readily accept that?

25 A. To my knowledge, they did.

1 Q. In reference to the alleged wetlands in that
2 particular area, can you still build in the wetlands,
3 or -- first of all, are there wetlands, is there wetlands
4 there?

5 A. I can refer to an Exhibit and show you more
6 clearly.

7 Q. Yes, please.

8 A. I'll refer to Exhibit 46, which is an aerial
9 photograph of the project site. Most of the wetlands on site
10 that occur naturally are located in the southwest portion of
11 the project site both north and south of Townsend Road.
12 Those wetlands will not be impacted by the project.

13 The wetlands that will be impacted by the project
14 include a drainage ditch that runs north/south through the
15 center of the property and a portion, not all, but a portion
16 of the eastern third of the site.

17 Now, this historically included some natural
18 uplands as well as upland areas. What occurred is, as you
19 can see, this area has already been impacted by previous
20 development. This area was scraped in the '70s when the
21 borrow pit was dug out, in the late '70s and '80s. It was
22 used as a location for open storage.

23 And what happened is when this area was graded, it
24 was graded flat without the ability to convey storm water off
25 the site quickly. So wetland plants now have come up and

1 occupied portions of this eastern area.

2 The project impacts will primarily be to this ditch
3 and areas from the center of the project site out a bit
4 toward the east.

5 A lot of the disturbed wetland that's located on
6 the eastern portion of the site will be used as a buffer area
7 for use to the east and will be used, will enhance that area,
8 both the natural wetland and the artificial wetland to
9 decrease it's diversity in wildlife habitat.

10 Q. Okay, thank you. You say that there will be some
11 regulatory audit keeping in reference to fuel hours burned,
12 gas, et cetera.

13 A. Yes.

14 Q. Who will maintain those records, DEP or a higher
15 authority?

16 A. To my knowledge, they'll be maintained both by the
17 operator of the plant and by the Department of Environmental
18 Protection.

19 Q. At the state level or the federal level?

20 A. State.

21 Q. Does the federal level ever come in and oversee the
22 state, or is that just a no-no?

23 A. Not to my knowledge; but perhaps the second witness
24 can speak more to that.

25 Q. Okay. I think you testified that there were no

1 endangered species in reference to that proposed site.

2 A. Correct.

3 Q. Who did the analysis in reference to endangered
4 species?

5 A. An ecologist by the name of David Culver who works
6 for Golder Associates and also a gentlemen by the name of Jim
7 Newman.

8 Q. Is that a part of the Exhibits? Is that
9 information available in the Exhibits?

10 A. No. No, there may be some previous excerpts of
11 their evaluation as a part of the original permit
12 application. But those documents aren't a requirement for
13 the permitting program.

14 Q. Would they be in this document here?

15 A. Should be.

16 Q. Okay. Should be or they are?

17 A. I'd have to look to refresh my memory.

18 Q. Go right ahead. While you're looking, did your
19 experts monitor the area year round or was there a
20 specified --

21 JUDGE: One question at a time, sir.

22 MR. ROWE: Sorry about that sir.

23 THE WITNESS: I refer to Applicant's
24 Exhibit Number One, that is the Air Permit
25 Application and PSD Analysis. Under Section

1 Seven entitled Additional Impact Analysis,
2 there is a sub section called -- numbered
3 7.2, the title of which is Impact on Soils,
4 Vegetation and Wildlife.

5 BY MR. ROWE:

6 Q. Very good, sir. Now, the other question was the
7 person that did this evaluation, was that a year round or was
8 that just one weekend or --

9 A. No, no, it was seasonal. It began in '96. And as
10 I stated earlier, there were a number of times when our
11 ecologists were out on the site, so that would have occurred
12 probably during all four seasons.

13 Q. What do you mean when you say all four seasons,
14 winter --

15 A. It would be spring and fall, summer and winter.

16 Q. Did they live there?

17 A. No.

18 Q. How did they conduct the analysis?

19 A. They traveled to the site by vehicle and then they
20 traversed the property in different directions based on their
21 specific purpose for the day. So they would have walked
22 through or around the different vegetation communities on the
23 site, which would have included the natural wetland, the
24 disturbed wetland, also the pine flatwoods and the open
25 fields that are out there.

1 Q. And they never saw any birds that were being
2 commented about today.

3 A. That's correct.

4 Q. Okay. You said there's a drainage ditch there. Is
5 that drainage ditch used for storm water to go into that rock
6 pile? What is the purpose of that ditch?

7 A. The -- I'll refer again to Exhibit 46. The ditch
8 that's located in the central portion of the property
9 essentially drains rainwater from the property itself.
10 Because of the elevations to the north of the site, the
11 disturbed and developed areas east of the site and I-95 to
12 the west, the drainage for the site is essential to the site
13 itself.

14 Eventually, this discharge goes underneath
15 Interstate 95 and then into State Road 520 right-of-way.

16 Q. So you won't be disturbing any of that area there,
17 you'll be building, more or less, to the, closer to yourself
18 there.

19 A. Correct, the footprint of construction is limited
20 to this area of pine flat woods on the western half of the
21 site and then the disturbed areas that are in the east
22 central portion of the site.

23 Q. Thank you, sir. Of all that water that you're
24 using running through that system, how much of that water,
25 if you can say hypothetically, I don't know what I'm talking

1 about, if you put a gallon in there, how much of that will go
2 up in evaporation?

3 A. Probably 98, 99 percent.

4 Q. 98, 99 percent. And how much water's going to be
5 running through that system a day?

6 A. 121,000 gallons a day when the plant is operating
7 on natural gas for a 17-hour period. It could be
8 substantially less if the operation is of shorter duration.
9 It would be more, obviously, if it ran greater than 17 hours.

10 Q. But it is anticipated it will run 17 hours a day?

11 A. One of the design bases for the project is a
12 17-hour operational day.

13 Q. How much will it deal with in oil, is there a
14 change in the figures there? Would it use more or less?

15 A. The operation on fuel oil would result in an
16 increase in the use of water.

17 Q. And how much less in burning oil?

18 A. Well, it would be more than oil -- I'm sorry, it
19 would be more than natural gas. If the plan were to operate
20 17 hours a day on natural gas, water consumption would be
21 approximately 1,115,000 gallon.

22 Q. And if it was burning oil, how much water
23 consumption would be utilized?

24 A. That was the number I just mentioned.

25 Q. That was oil.

1 A. I'm sorry, I misunderstood you.

2 Q. That was oil.

3 A. Yes.

4 Q. And could you repeat that figure again for the
5 natural gas?

6 A. Yes, for natural gas, based on a 17-hour day,
7 anticipated water use would be 121,000 gallons per day.

8 Q. You have classified yourselves as a Title V
9 company. What kind of pollutants will be produced?

10 A. Golder is not a Title V company.

11 Q. No, no, not you, Oleander Power Plant is.

12 A. Okay.

13 MR. DEE: Mr. Rowe, the error issues
14 will be addressed by the next two witnesses.

15 MR. ROWE: Sorry about that.

16 THE WITNESS: That's okay.

17 MR. ROWE: I think that concludes my
18 questions.

19 JUDGE: Redirect.

20 MR. DEE: Yes, sir, just very briefly.

21

22 REDIRECT EXAMINATION

23 BY MR. DEE:

24 Q. Mr. Zwolak, do you know whether the United States
25 Environmental Protection Agency has recommended guidelines

1 for noise levels to protect public health and welfare?

2 A. Yes, they do.

3 Q. Has Oleander agreed to meet those noise guidelines
4 at the property line of the site?

5 A. Yes, they have.

6 Q. And that agreement is reflected in the Stipulated
7 Settlement Agreement with the County?

8 A. It is.

9 MR. DEE: I have no further questions
10 for you, sir.

11 MR. BOCK: Judge, can the public ask
12 any questions at all, just to have it on
13 the record?

14 JUDGE: No. You're excused from your
15 oath, you're excused as a witness.

16 THE WITNESS: Thank you.

17 MR. ROWE: Thank you, sir.

18 JUDGE: Let's go off the record.

19 MR. DEE: Yes, sir.

20 (Whereupon, a luncheon recess was taken from 11:55
21 a.m. to 1:30 p.m.)

22 JUDGE: Mr. Dee, call your next witness.

23 MR. DEE: At this time, Oleander Power
24 Project would call Mr. Ken Kosky.

25

1 WHEREUPON,

2 KENNARD KOSKY,

3 being first duly sworn by the Court Reporter to tell the
4 whole truth as hereinafter certified, was examined and
5 testified under the oath as follows:

6 JUDGE: State your first and last name,
7 and spell each name for the record, please.

8 THE WITNESS: Kennard, K E N N A R D, F,
9 Kosky, K O S K Y.

10 JUDGE: Mr. Dee.

11 DIRECT EXAMINATION

12 BY MR. DEE:

13 Q. Yes, sir, where are you employed, Mr. Kosky?

14 A. I'm employed by Golder associates, Inc., 6241
15 Northwest 23rd Street, Gainesville, Florida.

16 Q. Are you familiar with the Oleander Project that
17 is the subject of this hearing?

18 A. Yes, I am.

19 Q. Would you just tell us very quickly why you're
20 familiar with this project.

21 A. I was the engineer of record for the air permit
22 and PSD application and drafted all the studies that were
23 conducted thereon.

24 Q. What is your job title at Golder?

25 A. I'm a principal with Golder.

1 Q. What does that mean when you say you're a
2 principal?

3 A. I'm a senior level person involved in the review
4 and conducting of various environmental studies. My
5 specialty is air pollution control, specifically working with
6 electrical power plants.

7 Q. What academic training do you have for your work on
8 power plants?

9 A. I have a Bachelor's of Science in Engineering,
10 1970, from Florida Atlantic University, a Master's of
11 Science, 1976, from University of Central Florida. I have
12 a year and a half, completed all my course work for a Ph.D
13 at the University of Central Florida and have conducted, been
14 present at EPA-sponsored training programs on air pollution
15 control and air pollution studies.

16 Q. Approximately how many years have you worked on air
17 pollution control issues?

18 A. Twenty-nine years.

19 Q. Could you just summarize your work experience with
20 regard to air pollution control issues.

21 A. I started my career in 1970 working for the
22 predecessor of the Environmental Protection Agency. I was
23 actually assigned to the State of Florida developing the
24 first air pollution plant.

25 In April, '72, I was employed by the predecessor

1 to the Florida Department of Environmental Protection, worked
2 in the central district in the operations area.

3 In September, '74, I began a career as a
4 professional consulting engineer for Environmental Science
5 and Engineering. I worked there 11 years prior to forming
6 KBN Engineering and Applied Sciences, which merged with
7 Golder Associates in 1996.

8 Q. Are you a Registered Professional Engineer in
9 Florida?

10 A. Yes, I am. I'm registered in mechanical
11 engineering and I've held that registration since 1976.

12 Q. Have you taught any courses concerning air
13 pollution control issues?

14 A. Yes, I have, both at the University of Central
15 Florida and University of Florida. I've taught courses at
16 the Chamber of Commerce as well as for the Florida Bar
17 Association.

18 Q. Approximately how many projects have you evaluated
19 during your career that have dealt with air pollution control
20 issues?

21 A. I've worked on several hundred projects working in
22 air pollution control. When I was employed by the
23 predecessor, Environmental Protection Agency, I permitted
24 sources, developed control strategies for sources and
25 evaluated projects in terms of their air quality impacts.

1 As a professional engineer, I've been involved in
2 hundreds of air pollution projects principally involving the
3 preparation of the air pollution permits, PSD permits for
4 electric power plants. I've been involved in probably 30,000
5 megawatts of different types of studies.

6 Q. All right, sir. Has all of your work occurred here
7 in Florida?

8 A. No, it hasn't.

9 Q. Could you give us an idea of other locations where
10 you've worked.

11 A. I've worked primarily in Florida since 1970. I
12 have worked in other states, other southeast states, as well
13 as the state of Maryland and the midwest.

14 I've also worked in power plant development
15 internally, being a consultant for the World Bank in Pakistan
16 as well as various projects throughout the world.

17 I've worked in China, Jamaica, Dominican Republic,
18 Buenos Aires, Argentina, and Brazil.

19 Q. Did you also work for the U.S. Agency for
20 International Development on these kinds of projects?

21 A. Yes, as a direct contractor evaluating and
22 performing environmental studies.

23 Q. Have you ever performed any analyses of the best
24 available control technology for the various sources of air
25 pollution?

1 A. Yes, I have.

2 Q. Have you ever been qualified before to testify as
3 an expert witness?

4 A. Yes, I have, I've been qualified about 40 times in
5 various different proceedings before the Environmental
6 Regulatory Commission Hearing Officers involving permit
7 aspects. I've been involved with County Courts, Circuit
8 Courts, the Grand Jury, the Government of Florida and also
9 the Florida Power Plant Siting Act. I've testified both for
10 the air pollution studies and best available control
11 technology.

12 Q. I'd like you to take a look at Exhibit 14 and tell
13 me whether that's a correct copy of your resume'.

14 A. Yes, it is.

15 Q. Does your resume' accurately summarize your
16 academic and professional accomplishments?

17 A. Yes, it does.

18 Q. All right, sir.

19 MR. DEE: Your Honor, at this time we
20 would proffer Mr. Kosky as an expert in
21 the field of air pollution control and
22 best available control technology.

23 MR. GOORLAND: No objection.

24 MR. ROWE: No objection.

25 JUDGE: The Witness is accepted as an

1 expert for the purposes tendered without
2 objection.

3 Go ahead, Mr. Dee.

4 BY MR. DEE:

5 Q. Mr. Kosky, can you just briefly summarize the work
6 that you've done for the Oleander Power Project.

7 A. I was the professional engineer of record for
8 preparation of the air permit application submitted to the
9 Department of Environmental Protection. This involved
10 completion of the application form as well as preparation of
11 the, what's called prevention of significant deterioration
12 analysis.

13 I was the professional engineer that signed the
14 application.

15 During the course of the review, I was involved in
16 the preparation of various documents as well as updates to
17 the application that was submitted to the Florida Department
18 of Environmental Protection for its review and ultimately
19 issuance of a draft permit.

20 Q. Can you just very briefly describe the regulatory
21 mechanisms that are used here in Florida and elsewhere in the
22 United States to manage air pollution control issues.

23 A. There's two principal factors that are involved in
24 air quality management. The first is ambient air quality
25 standards. Ambient air quality standards were established by

1 the Environmental Protection Agency starting in 1970 as a
2 means to protect the general public health and welfare of the
3 general pollution with an adequate margin of safety. It's
4 where people breathe.

5 Generally, these types of standards are established
6 in units of mass per unit volume.

7 The second aspect of air quality management is
8 really emission standards of some type. Emission standards
9 can be set in a couple ways. One is to establish an emission
10 standard to meet an ambient standard, or they could be
11 technology based.

12 Technology-based standards were promulgated by EPA
13 starting in the early '70s as new source performance
14 standards. That is, for new sources, they have to meet these
15 more stringent base technology standards.

16 These standards are typically given in units that
17 are common to the type of industry for a combustion turbine.
18 It's in parts per million by volume.

19 Q. Let's go back to the Oleander Power Project. Can
20 you just briefly describe the type of combustion technology
21 that will be used in this case and the fuels that will be
22 used.

23 A. The Oleander Power Project will use combustion
24 turbines that are manufactured by the General Electric
25 Company. The model is the Frame 7FA combustion turbine.

1 It's an industrial -- heavy industrial turbine that works
2 on a same principle as a jet engine, albeit more complicated.

3 The engine will burn primarily natural gas with a
4 limit of 3,390 hours per year with a backup fuel of oil, and
5 that's going to be limited to an equivalent of 1,000 hours
6 per year.

7 Q. What Can you tell us about the state of your
8 knowledge about combustion turbines, and these GE turbines
9 in particular, how advanced are they?

10 A. These combustion turbines will be the most advanced
11 for peaking service in Florida. Much improvements have been
12 made in the technology of combustion turbines to make them
13 more and more efficient.

14 They also use a type of air pollution control
15 technology that's called Dry Low-No_x, usually called DLN,
16 that will be used to control the emissions when combusting
17 natural gas. And when combusting oil, water injection will
18 be used.

19 If you look at the fleet of turbines in Florida,
20 these will be clearly the most efficient in terms of most
21 emissions as well as producing power.

22 Q. Now, you've mentioned that this project will be
23 limited to operating a maximum of 3,390 hours per year. How
24 many hours are there in a year?

25 A. There's 8,760 per year.

1 Q. What will happen during those other hours in this
2 instance?

3 A. The plant would not operate for those hours.
4 Essentially, 60 percent of the time the plant just wouldn't
5 operate at all.

6 Q. Would there be any airborne emissions during 60
7 percent of the time?

8 A. No.

9 Q. Now, how will the air pollutant emissions be
10 controlled at the Oleander Power Project?

11 A. As I mentioned briefly, there's various pollutants
12 that could be emitted and the technology that's incorporated
13 into the General Electric turbines are the DLN technology,
14 and that will control nitrogen oxides when combusting the
15 natural gas, and water injections when combusting the oil.

16 Also, pollutants such as particulate matter and
17 sulfur dioxide which are more from the impurities in fuel
18 will be very low. Natural gas is the cleanest of fossil
19 fuels. And the type of oils that will be used is also very,
20 very clean.

21 Other pollutants such as carbon monoxide and
22 volatile organic compounds are controlled in the combustion
23 process itself.

24 Q. Okay, could you take a look at Exhibit 28 and use
25 that Exhibit to describe for us the type and amounts of air

1 pollutants that will be emitted from the Oleander Power
2 Project.

3 A. All right, Exhibit 28 shows the emissions of the
4 Oleander Project for the major air pollutants that would be
5 emitted by the project. The first column has the five major
6 pollutants, particulate matter and PM₁₀. PM₁₀ is particulate
7 matter with the aerodynamic diameter less than ten microns.
8 Sulfur dioxide, nitrogen oxide, carbon monoxide and volatile
9 organic compounds.

10 Of the five, the emission will be slightly
11 different on gas and oil. And then there will be different
12 emission rates. What I've shown in the Exhibit in the third
13 and fourth column is the emission level consistent to what is
14 normally indicated in the type of technology.

15 For particulate matter, for example, it's in pounds
16 for opacity. Both fuels will have what's called 10 percent
17 opacity. For nitrogen oxide, carbon monoxide and VOC's, it's
18 in parts per million, that is so many parts by volume in a
19 million parts of air.

20 Also, in the table it shows pounds per million BTU,
21 pounds per in CT, which is part of the permitting process as
22 well as tons per year and tons per year for the overall
23 project. That's used mainly in items of regulatory criteria
24 and is somewhat misleading when the, particularly when you're
25 dealing with something like a gas.

1 For example, the combustion turbine actually uses
2 air as its working fluid. And for each hour it operates, it
3 will actually process 3.5 million pounds of air. If it were
4 to operate the whole year, it's something like six million
5 tons.

6 So sort of put in perspective, some of these
7 emissions with respect to the new source performance
8 standards that I had mentioned earlier, there are two that
9 are important. One is for nitrogen oxide. The proposed
10 natural gas limit is nine parts per million by volume
11 with a correction for oxygen. The actual limit, new source
12 performance standard limit that the EPA has promulgated and
13 the EPA has adopted is over 100. So it's a factor of ten.

14 Similarly, for sulfur dioxide it's a percentage of
15 fuel. It's going to be 16 to about 400 times less than the
16 new source performance standard. For example, on oil,
17 the -- in the event it is operated, it's .05 percent sulfur
18 at the Oleander Project. The new source performance standard
19 for the project limit is .8, so well over a factor of 10.

20 Q. Let me go back for just a second very quickly. You
21 mentioned CT, does that mean the combustion turbine?

22 A. Yes, combustion turbine.

23 Q. You talked about 10 percent opacity, is that an
24 emission limit that will be imposed on this facility?

25 A. Yes, it is.

1 Q. All right. Now, how do -- you've compared the
2 emission rates for the Oleander Project with the emission
3 limits that are established in the new source performance
4 standards. How do the emission rates from this plant compare
5 with the emissions from other simple cycle peaking
6 facilities?

7 A. Well, in terms of production rate, the actual
8 amount of pollution relative to the production rate, which
9 in this case is electricity, is going to be a lot less. The
10 type of machine that's being used is just more efficient.

11 For example, a unit that can be compared is the
12 pounds of pollutant per megawatt hour. A megawatt hour is
13 a million watts. A million watts is about what a residential
14 home would use in a whole month.

15 This project on natural gas will emit .3 pounds per
16 megawatt hour. If you were to look at gas turbines of the
17 '70s vintage, which there are in Florida, their emissions are
18 6 to 7 pounds per megawatt hour. So in fact, the emissions
19 in terms of what the production rate is even less, like more
20 than 20 times lower than that.

21 Q. How will the NO_x emissions in comparison compare to
22 the NO_x emission rates from other peaking plants here in
23 Florida?

24 A. It will be the lowest emitting peaking unit in
25 Florida for natural gas. And in terms of the emissions on

1 oil, it will be at the lowest that's been approved in Florida
2 or in other places on gas.

3 Q. All right, sir. Is this project subject to review
4 under the DEP regulations for the prevention of
5 deterioration?—

6 A. Yes, it is.

7 Q. Could you explain that process for us and that
8 program.

9 A. Major sources in Florida as well as in other parts
10 of the country are required to undergo what's called a
11 prevention of significant deterioration review, or PSD. A
12 PSD review is applicable to new sources which are in 28
13 categories that emit 100 tons a year or more of a pollutant
14 regulated by the regulations, or 250 tons per year.

15 This program was adopted initially in the 1977
16 amendments to the Clean Air Act, at which time EPA wrote
17 implementing regulations.

18 Florida's regulations coincide with the EPA
19 regulations, and those regulations have been approved by
20 EPA.

21 Q. The DEP regulations have been approved by EPA?

22 A. Yes, they have.

23 Q. All right. I'd like you to take Exhibit 29 and use
24 that to tell us which pollutants are subject to PSD review
25 for the Oleander Power Project.

1 A. As I indicated earlier, tons a year is important
2 criteria in evaluating thresholds for review. Exhibit 29
3 shows a list of 16 what's classified as PSD pollutants, of
4 which the Oleander Project would be required to undergo
5 review on six of them.

6 This review, called a PSD review, involves air
7 quality type analysis that might include monitoring as well
8 as determining compliance with the air standards, as well as
9 a control technology type review that includes best available
10 control technology.

11 The pollutants subject to PSD are sulfur dioxide,
12 particulate matter, nitrogen oxides, carbon monoxide,
13 volatile organic compounds and sulfuric acid mist.

14 Q. With regard to those pollutants, did you perform
15 a determination of the best available control technology?

16 A. Yes, I did.

17 Q. Okay, and just describe very generally what is
18 involved in performing a BACT determination, or best
19 available control technology determination.

20 A. The best available control technology determination
21 is really a case-by-case determination that evaluates the
22 feasible control technologies that can achieve a maximum
23 emission reduction, or the lowest level, as well as the
24 environmental, economical and energy impacts of that
25 technology.

1 Alternative technologies are evaluated and can be
2 rejected based on the economic, environmental and energy
3 considerations. In this evaluation, what's required is to
4 look at available information from the DEP and other states,
5 look at engineering and scientific information on the
6 technologies and then looking at the cost, particularly the
7 economic, any social costs or any impacts.

8 This is weighed ultimately by FDEP in making a
9 determination of best available control technology.
10 Alternative technologies can be rejected based on either
11 technical feasibility as well as the impacts on the
12 environment, energy and economic consequences of the
13 project.

14 Q. You mentioned that you performed a BACT
15 determination in this case. Was your BACT analysis performed
16 in compliance with the applicable EPA and DEP requirements?

17 A. Yes, it was.

18 Q. What did you do in this instance?

19 A. BACT requires looking at the type of source as a
20 combustion turbine, in looking at those technologies that
21 could achieve the maximum reduction. It's an approach called
22 a top-down approach, where you evaluate any technology that
23 might be available and look at its technical feasibility as
24 well as looking at the associated impacts.

25 Q. I'd like you to take Exhibit 30 and very quickly

1 summarize your findings and your BACT analysis for each of
2 the pollutants that you evaluated.

3 A. Exhibit 30 is a summary of the best available
4 control technologies for the major pollutants. What was
5 concluded was that the Dry Low-NO_x, or DLN technology, for
6 natural gas and water injection for oil were the best
7 combustion technologies for nitrogen oxides, carbon monoxide
8 and volatile organic compounds.

9 For pollutants that are involved in impurities in
10 the fuel, it was natural gas and low sulfur distillate oil,
11 which includes particulate matter and sulfur dioxide
12 considerations.

13 Q. All right, does the BACT determination result in
14 the establishment of an emission limit?

15 A. Yes, it does.

16 Q. All right, sir. What emission limits were
17 established as BACT in this case for the control of NO_x?

18 A. For NO_x, a BACT limit of nine parts per million
19 by volume dry collected to -- corrected to 15 percent O₂ when
20 firing natural gas and 42 percent per million again corrected
21 to 15 percent oxygen for distillate oil. And that's using
22 Dry Low-NO_x technology for gas and water injection for oil.

23 Q. All right, sir, before we broke for lunch, Mr. Rowe
24 was asking Mr. Zwolak about comments that were apparently
25 submitted by the U.S. Fish and Wildlife Service considering

1 the appropriate limits for NO_x, did you hear those questions?

2 A. Yes.

3 Q. Do you have any response to the suggestion that the
4 emission for NO_x when firing fuel oil should be lower than 42
5 parts per million?

6 A. Yes, we actually -- actually wrote the Department
7 concerning that. I did review the permit. I'm also familiar
8 with the technology. That particular comment by the Park
9 Service was just technically incorrect. They might have
10 looked at the gas number. The lower number of 25 that was
11 quoted is for natural gas on the project that they had quoted
12 in reviewing the permit.

13 So for oil, the 42 is the lowest that has been
14 approved and especially for this type of turbine.

15 Q. Do you know whether, if the United States
16 Environmental Protection Agency has reviewed the BACT
17 determination and the emission limits that have been proposed
18 for the Oleander Power Project?

19 A. Yes, they have, and they provided comments to DEP.
20 They did not have any adverse comments on the permit and, in
21 fact, discussions with Region Four, myself as well as I'm
22 doing some permitting up in the northern tier state in Region
23 Five, that Region Four actually feels like this is a -- I
24 could characterize it maybe as a model type of emission limit
25 for a peaking plant.

1 It's one -- it's the lowest that's been approved so
2 far in Region Four for a peaking plant. And in fact, the
3 permit has been sent to Region Five as sort of a model of
4 some plants that are being permitted up in, in the Wisconsin
5 and Minnesota-area.

6 Q. So am I correct in understanding that the emission
7 limits proposed for the Oleander Power Project are being used
8 to set the standards applicable to other facilities elsewhere
9 in the United States?

10 A. I believe they are and they have.

11 Q. Why does Oleander want to use fuel oil in this
12 case?

13 A. Using fuel oil is, as a backup to natural gas, the
14 only reason most people use oil is that in the event you have
15 some kind of disruption with natural gas, which actually
16 occurred a year ago in the pipeline near Perry, I think it
17 was in the newspapers; fortunately, during that case it was
18 during a weekend which there was less use.

19 But in the event you don't have natural gas, you
20 have to use some kind of backup fuel to provide peaking.

21 Q. Has Oleander agreed to reduce its use of fuel oil
22 in this case?

23 A. Yes, as a result of actually two things. One, the
24 public workshops, there was comments about the oil use.

25 And secondly, discussions with DEP. So the oil was

1 originally 2,000 hours, the same maximum limit of operation,
2 but within that 2,000 hours of oil, and that was decreased to
3 2,000 hours of oil.

4 Q. Does Oleander have any economic incentives to want
5 to reduce the use of fuel oil?

6 A. Yes, they do. There's actually two factors that
7 are involved and both together increase the cost of burning
8 oil by 35 to 50 percent on the same basis of gas. One factor
9 is oil is just more experience.

10 And secondly, the water and everything else, the
11 maintenance adds to that cost.

12 Q. Oleander would have to buy water when it's burning
13 natural fuel oil?

14 A. Effectively, yes. Even if they're getting water,
15 you have to treat it because the water that's being used is
16 essentially pure, pure water. So you make it, it has a cost.

17 Q. How do the limits on fuel oil in this case compare
18 to the limits imposed on other power plants?

19 A. It's actually lower than most plants. If you look
20 at probably well over 1,000 megawatts of simple cycles
21 permitted in the 1990s, the average is more like 2,000 units
22 of operation for those units. This is actually lower than
23 those facilities.

24 Q. Have you reviewed Exhibit 11, which is the draft
25 for the permit for the Oleander Power Project?

1 A. Yes, I have.

2 Q. If the project is built and operated that's
3 described in the application that has been submitted to the
4 DEP, will the project be able to comply with all the
5 conditions and emission limits contained in DEP's draft--
6 permit?

7 A. Yes, I can.

8 Q. Can the GE combustion turbines that are being
9 proposed in this case comply with DEP's combustion limits?

10 A. Yes.

11 Q. Can Oleander hire or staff their own plant to be
12 in compliance with the DEP permit limits?

13 A. Yes, these type of combustion turbines are highly
14 automated. Having been to engineering school with a slide
15 rule, the difference is between having valves and having
16 computer screens. Power plants today have all computer
17 screens and all the control equipment is fully automated.

18 The parent company of Oleander has an institution
19 where they actually -- the environmental people train the
20 operators in how to operate, and there will be what's called
21 continuous emission monitors monitoring the pollutants from
22 the stacks so they'll know how they're operating at any time.

23 Q. Did you prepare any sections of Exhibit One, which
24 is the air permit application submitted to DEP for the
25 project?

1 A. Yes, I did.

2 Q. All right. Did you prepare or assist with the
3 preparation of Exhibits 6, 9, 10 and 13, which are letters
4 and materials from Golder to DEP concerning this project?
5 That would be 6, 9, 10 and 13.

6 A. Yes.

7 Q. All right, now, during your testimony you've
8 discussed Exhibits 14, 28, 19 and 30. Did you prepare all
9 of these exhibits?

10 A. Yes, I did.

11 Q. With regard to all of these Exhibits that I've just
12 mentioned, all of these Exhibits that you've prepared, are
13 the statements in those documents true and correct, to the
14 best of your knowledge?

15 A. Yes, they are.

16 Q. Do you adopt the statements in those documents as
17 part of your testimony here today?

18 A. Yes, I do.

19 MR. DEE: Your Honor, at this time we
20 would like to move the following Exhibits
21 into evidence: It would be Exhibits 1, 6, 9,
22 10, 13, 14, 28, 29 and 35.

23 JUDGE: You didn't mention 11.

24 MR. DEE: That's a letter from DEP.

25 We'll have another witness address that.

1 JUDGE: Okay, fine. Any objection?

2 MR. GOORLAND: Not if I could have one
3 moment to pull these out.

4 JUDGE: Sure.

5 MR. GOORLAND: No objection.

6 JUDGE: Mr. Rowe?

7 MR. ROWE: No objection.

8 JUDGE: I'm going to take these in my
9 order, not necessarily numerical order.
10 I'll go slowly.

11 Oleander's Exhibits 14, 28, 29, 30, 1 --

12 MR. ROWE: Did you say 1?

13 JUDGE: Yes, 1, 6, 9, 10 and 13 are
14 admitted in evidence without objection.

15 (Whereupon, Respondent's Exhibits 14, 28, 29, 30,
16 1, 6, 9, 10 and 13 were marked and received in evidence.)

17 JUDGE: Go ahead, Mr. Dee.

18 MR. DEE: I have no further questions
19 for this Witness.

20 JUDGE: Further direct?

21 MR. GOORLAND: None, thank you.

22 JUDGE: Cross.

23 MR. ROWE: Cross, is that me?

24 JUDGE: That's you.

25 MR. ROWE: I'm getting the hang of it.

CROSS EXAMINATION

1

2 BY MR. ROWE:

3 Q. There is some concern in reference to a letter of
4 concerns pertaining to, I guess, U.S. Fish and Wildlife where
5 they had recommended -- I haven't made this an exhibit,
6 yet -- that's in reference to recommended -- I don't know how
7 to say it, that the nitrogen be lowered to 25, I think it's
8 PPM, or something of that nature. I think you testified that
9 they made an error thinking that was gas or something of that
10 nature?

11 A. That's correct.

12 Q. However, on the, all through here it appears
13 they're not saying that it's gas, they're saying that it's
14 oil. And on the last page it even makes reference -- or one
15 of these pages it makes reference to, what is that,
16 Auburndale Power Partners, that's on the last page, and
17 something about Texas and the Mexico Power has also required
18 25 PPM, you'll have to excuse me, I'm not familiar with all
19 this technology.

20 A. We went and looked particularly with the Auburndale
21 Power Project and actually reviewed the permit. We actually
22 collect a lot of permits because when we do air quality
23 analyses you have to know what the emissions are. And in
24 fact, about that same time frame we had projects in Polk
25 County for these projects and we had the permit.

1 And in fact, the permit did not have PPM for oil,
2 it had actually 25 PPM for gas and, actually, it was a tier
3 down kind of permit.

4 The other aspect is that particular project was
5 also much smaller than the type of turbine project that we
6 have. But that, I know for a fact, permit did not say 25 for
7 oil. It was 25 for gas and it had, I believe it's 42 PPM for
8 oil firing.

9 Q. Is that information within the Exhibits or the
10 application that's being applied for here? I mean, is there
11 any way I can substantiate that what you're saying is valid?

12 A. I believe one of the Exhibits which we, was
13 correspondence to the Florida Department of Environmental
14 Protection that actually stated what the permit was. The
15 permit itself isn't in here.

16 Q. Is there --

17 A. It's a matter of public record in terms of
18 availability from DEP. It would be in their files.

19 MR. ROWE: Is there a possibility I
20 can make -- I don't know how to do this,
21 Your Honor, but since it's not in there,
22 I would certainly like to have a copy of
23 that and that it do become a part of the
24 record.

25 I don't really know how to say that

1 or do it, but I'll say it in the simplest
2 way I know to say it. Because he's making
3 reference that that was a mistake.

4 JUDGE: Do you have a document you
5 want to submit in evidence?

6 MR. ROWE: Oh, I want to submit the
7 one I gave you, but he is saying that is
8 a mistake based upon the recommendations
9 put there.

10 JUDGE: I heard his testimony.

11 MR. ROWE: Yes, and I'm just saying
12 if that is so, then certainly I would like
13 to have a copy of the document and that
14 said document be entered into the record.

15 JUDGE: Are you submitting two documents
16 for admission?

17 MR. ROWE: No, no, that one, I don't know
18 what number you like to call it.

19 JUDGE: All right.

20 MR. DEE: Your Honor, I may be able to
21 make this a little simpler for everybody.
22 The transmittal letter is not part of the
23 record that we established so far. This
24 technical review is one of the exhibits
25 that we just moved into evidence.

1 In addition, Exhibit 13 is Golder's
2 response back to the Florida Department of
3 Environmental Protection concerning these
4 comments from U.S. Fish and Wildlife Service.

5 So Mr. Kosky's testimony is consistent
6 with the information he previously provided
7 to DEP concerning this committee.

8 JUDGE: Well, Mr. Rowe has moved a
9 document, I guess it's Petitioner's One?

10 MR. ROWE: It could be, yes, sir, whatever
11 you deem appropriate. Is that Petitioner or
12 Exhibit?

13 JUDGE: It's an exhibit and I'm identifying
14 it as Petitioner's Exhibit One.

15 MR. ROWE: Okay.

16 JUDGE: Mr. Dee?

17 MR. DEE: We have no objection.

18 JUDGE: Mr. Goorland?

19 MR. GOORLAND: No objection.

20 JUDGE: Petitioner's One as identified
21 is admitted on the record without objection.

22 (Whereupon, Petitioner's Exhibit Number One was
23 marked and received in evidence.)

24 JUDGE: Go ahead, Mr. Rowe.

25

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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

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

[Handwritten Signature]
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.

[Handwritten Signature]
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

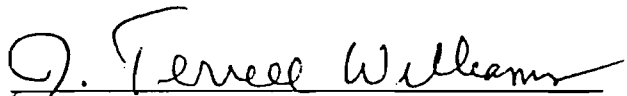
Ann Cole, Clerk and
Daniel Manry, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

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.

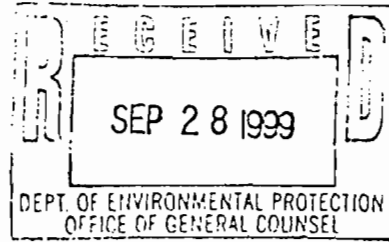
STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



J. TERRELL WILLIAMS
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3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Telephone 850/488-9314

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS



CLARENCE ROWE,)
)
Petitioner,)
)
vs.) Case No. 99-2581
)
OLEANDER POWER PROJECT, L.P., and)
DEPARTMENT OF ENVIRONMENTAL)
PROTECTION,)
)
Respondents.)
_____)

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
418 Pennsylvania Avenue
Rockledge, Florida 32955

For Respondent, David S. Dee, Esquire
Oleander Power Landers & Parsons
Project, L.P.: 310 West College Avenue
Tallahassee, Florida 32301

For Respondent, Scott A. Goorland, Esquire
Department of W. Douglas Beason, Esquire
Environmental Assistant General Counsel
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The Douglas Building
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Tallahassee, Florida 32399-3000

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

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 ("SO₂"), sulfuric acid mist ("SAM"), volatile organic compounds ("VOCs"), particulate matter ("PM"), and particulate matter less than ten microns in diameter ("PM₁₀"). (PM and PM₁₀ are referred to herein as "PM/PM₁₀.") 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/PM₁₀, SO₂, 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/m²"). By comparison, the current nitrogen deposition rate from other sources in the area is 0.4 g/m². 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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1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of September, 1999.

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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.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RECEIVED

SEP 20 1999

BUREAU OF AIR REGULATION

CLARENCE ROWE)
)
 Petitioner,)
)
 vs.)
)
 OLEANDER POWER PROJECT, L.P., and)
 STATE OF FLORIDA DEPARTMENT)
 OF ENVIRONMENTAL PROTECTION,)
)
 Respondents.)
)
)
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)

DOAH CASE NO. 99-2581
OGC CASE NO. 99-0932

**DEPARTMENT OF ENVIRONMENTAL PROTECTION'S
PROPOSED RECOMMENDED ORDER**

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, Daniel Manry, held a formal hearing in the above-styled case on August 30, 1999, in Viera, Florida.

APPEARANCES

For Petitioner, Clarence Rowe:

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Rockledge, Florida 32955

For Respondent, Oleander Power Project, L.P.:

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For Respondent, the Florida Department of Environmental Protection:

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STATEMENT OF THE ISSUE

The issue to be determined in this case is whether the Florida Department of Environmental Protection ("DEP") should issue a Prevention of Significant Deterioration air construction permit ("PSD") authorizing Oleander Power Project, L.P. ("Oleander") to construct five combustion turbines and two fuel oil storage tanks on a site located in Brevard County, Florida.

PRELIMINARY STATEMENT

On November 24, 1998, Oleander filed an application with DEP for a Prevention of Significant Deterioration air construction permit--i.e., a permit authorizing the construction of certain stationary sources of airborne emissions. On March 26, 1999, DEP issued a "Public Notice of Intent to Issue an Air Construction Permit" ("Public Notice") to Oleander. The Public Notice was attached to 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" for the Project. Clarence Rowe ("Mr. Rowe") subsequently filed a petition for a formal administrative hearing concerning DEP's Draft Permit and proposed agency action.

On August 30, 1999, a formal administrative hearing was conducted pursuant to Sections 120.569 and 120.57(1), Florida Statutes ("F.S.") At the administrative hearing, Oleander called four expert witnesses: Richard Zwolak (accepted as an expert regarding land use planning, land use compatibility analyses, and socioeconomic and environmental impact assessments); Ken Kosky (accepted as an expert regarding air pollution control and best available control technology); Bob McCann (accepted as an expert in meteorology, air quality dispersion modeling and air pollution impact assessments); and Al Linero (accepted as an expert in air pollution control issues, the DEP regulations that govern new sources of air pollution, and air permitting). Oleander introduced exhibits 1-3, 5-17, 19-32 and 34-46 into evidence. T 131-32, 175-76, 216-18, 237.

The DEP did not call any witnesses or introduce any exhibits.

Mr. Rowe called no expert witnesses and one non-expert witness, Mrs. Juanita Barton. Mr. Rowe introduced exhibits 1, 3 and 7 into evidence. T 180, 252, 261.

At the administrative hearing, the public was given an opportunity to provide oral and written comments about the Project. Five individuals availed themselves of this opportunity. The individuals were not sworn or placed under oath.

In response to various allegations by Mr. Rowe, Oleander attempted to introduce evidence at the final hearing concerning "environmental justice" issues. DEP objected to the introduction of this evidence on the ground that DEP does not have jurisdiction to consider environmental justice concerns. T 68, 116. DEP's objection was sustained, but Oleander was allowed to proffer its evidence concerning environmental justice. T 117.

The transcript of the administrative hearing was filed with the Division of Administrative Hearings on September 7, 1999, and the parties were allowed 10 days to submit proposed recommended orders. Oleander and DEP timely filed proposed recommended orders on September 17, 1999.

Based on all of the evidence of record, the following findings of fact are determined:

FINDINGS OF FACT

Description of the Proposed Project

1. Oleander intends to build and operate an electrical power plant (the "Project") in Brevard County, Florida. T 96. Oleander's Project involves the construction and operation of five 190 megawatt ("MW") combustion turbines that will be used to generate electricity. Exs. 1, 11; T 96, 98. 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. Exs. 1, 11; T 106-07.

2. Oleander's Project will be a "peaking" power plant. Exs. 1, 11; T 96. A peaking power plant operates only during times of peak demand for electricity (e.g., during hot or cold weather). T 96-97. Since the Project will be a peaking power plant, Oleander only requested authorization from DEP to operate the Project's combustion turbines for a maximum of 3,390 hours per year (approximately 39% of the total hours in a year). T 97; Ex. 1 at 2-1; Ex 11, Draft Permit at 7. During the remainder of the year, the Project's combustion turbines will not operate and will not have any airborne emissions. T 163. As a practical matter, peaking power plants in Florida historically have operated less than 800 hours per year. T 98.

3. Oleander's combustion turbines will be the most advanced turbines used in Florida for peaking service. T 162. 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. T 162, 166.

4. The primary fuel for the power plant will be natural gas, which is the cleanest burning fossil fuel. T 162-63. If natural gas is unavailable, low sulfur distillate fuel oil (a maximum of 0.05 percent sulfur) may be used as back-up fuel, but only for the equivalent of 1,000 hours per year of full load operations. T 162; Ex. 9; Ex. 11, Draft Permit at 6. Oleander has economic incentives to minimize the use of oil; oil is 35% to 50% more expensive to use than natural gas. T 173; Ex. 6 at 3, 4.

The Site

5. The Project will be built on a site ("Site") that is located northeast of the intersection of Interstate 95 ("I-95") and State Road ("SR") 520 in unincorporated Brevard County. T 101; Ex. 36, 46. The Site contains approximately 38 acres of land. Ex. 1 at 2-1.

The DEP Review Process

6. On November 24, 1998, Oleander filed an application with DEP for a Prevention of Significant Deterioration air construction permit for the construction of the five combustion turbines and two fuel oil storage tanks that Oleander intends to build at the Site. Exs. 1, 11. DEP reviewed Oleander's application, it requested and received additional information concerning the Project, and it independently verified the impacts assessments contained in the application. T 229-31; Exs. 3, 5, 6, 9, 10. On March 3, 1999, DEP held a public meeting in Brevard County to receive public comments regarding Oleander's application. T 129; Ex. 11 at TE-11. On March

26, 1999, DEP issued its Public Notice of DEP's intent to grant the Draft Permit to Oleander. Ex. 11. On April 8, 1999, DEP's Public Notice was published in Florida Today. Ex. 12. On May 13, 1999, DEP held a second public meeting in Brevard County to receive public comments concerning Oleander's application. T 231-33. Public comments also were presented at the final administrative hearing on August 30, 1999. T 29-65. Having considered Oleander's application, the public comments, and other relevant information, DEP recommends issuance of the air construction permit for the Project. T 231-33, 236.

Best Available Control Technology

7. The Project was evaluated by Oleander and DEP in accordance with the requirements established for DEP's PSD program. T 169-70, 233-34; Ex. 11 at TE-5. As part of the PSD review process, a determination of the Best Available Control Technology ("BACT") was made. T 233-34; Ex. 11, Appendix BD. A BACT determination involves a case-by-case analysis of those air pollution control technologies that are feasible and can achieve the maximum emissions reductions. T 168-69. The 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. T 168-69; Ex. 11 at BD-2. A BACT determination results in the establishment of an emission limit for each pollutant of concern. T 170. In this case, DEP determined the appropriate BACT limits for the Project's emissions of carbon monoxide ("CO"), oxides of nitrogen ("NOx"), sulfur dioxide ("SO₂"), sulfuric acid mist ("SAM"), volatile organic compounds ("VOC's"), particulate matter ("PM") and particulate matter less than ten microns in

diameter ("PM₁₀"). (PM and PM₁₀ are referred to herein as "PM/PM₁₀"). T 170; Ex. 30; Ex. 11, Appendix BD.

8. The DEP determined that BACT for NO_x is an emission limit of 9 parts per million ("ppm") (corrected to 15% oxygen) when the Project is operating on natural gas. T 170; Ex. 11, Appendix BD at BD-11. This emission limit is based on the use of dry low NO_x ("DLN") combustion technology, which is incorporated into the design of the combustion turbines that will be used for the Project. T 170. DEP's proposed NO_x emission limit of 9 ppm is the lowest emission limit in Florida for simple cycle peaking power plants and is setting the standard for similar facilities throughout the United States. T 166, 171-72, 233-34; Ex. 6 at 4; Ex. 11, Appendix BD at BD-11, BD-12.

9. The DEP determined that BACT for NO_x is an emission limit of 42 ppm (corrected to 15% oxygen) if the Project operates on fuel oil. Ex. 11, Appendix BD at BD-11. This emission limit is based on the use of DLN and wet injection technology. Ex. 11, Appendix BD at BD-5; T 170. 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 NO_x. Ex. 11, Appendix BD at BD-5.

10. The U.S. Fish and Wildlife Service ("USFWS") provided comments to DEP concerning the Project. Exs. 4, 13. In their comments, the USFWS suggested that the NO_x emission limit should be 25 ppm when the Project is operating with fuel oil. Exs. 4, 13. However, the USFWS' suggestion was based on the USFWS' misreading of the provisions of other PSD permits. T 171, 177-78; Ex. 13. When read correctly, those permits establish the

same NOx emission limit when firing fuel oil that DEP established in this case--42 ppm. T 171, 177-78; Ex. 13.

11. In its BACT determination, DEP considered whether a selective catalytic reduction ("SCR") system should be used to reduce the Project's NOx emissions. Ex. 11, Appendix BD at BD-7. SCR is an add-on NOx control system in which ammonia is injected into the exhaust gases of a combustion turbine. Ex. 11, Appendix BD at BD-7. The exhaust gases are then exposed to a catalyst where the ammonia and the NOx react to form nitrogen and water. Id.

12. The DEP determined that SCR does not represent BACT in this case and should not be required for the Project. Ex. 11, Appendix BD at BD-12. 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. Ex. 10 at 4-16; Ex. 11 at BD-12; see Ex. 30.

13. The DEP determined that BACT for CO and VOC's is based on the Project's use of an advanced combustor design (i.e., DLN technology) and good combustion practices. T 170; Ex. 11, Appendix BD at BD-11. The use of an oxidation catalyst for CO removal was not required by DEP as BACT because an oxidation catalyst is not cost effective for the Project. Ex. 11, Appendix BD at BD-13; see Ex. 30.

14. The DEP determined that BACT for PM/PM₁₀, SO₂ and SAM is based on good combustion practices and the use of clean low sulfur fuels. T 170; Ex. 11, Appendix BD at BD-13.

15. All of the DEP's BACT emission limits are set forth in the Draft Permit. Ex.11

Impacts on Air Quality

16. The U.S. Environmental Protection Agency (“EPA”) has adopted primary and secondary Ambient Air Quality Standards (“AAQS”). T 188. The primary standards are designed to protect the public health, with an adequate margin of safety. T 189. The AAQS protect the young, the old, and those with respiratory diseases. T 189. Secondary standards are designed to protect the public welfare from any known or anticipated adverse effects of air pollution. T 161, 189; Ex. 1 at 3-1. The standards are reviewed every five years by scientists and physicians in light of the most recent scientific studies and data. T 189. DEP also has adopted AAQS. T 189-90.

17. In Brevard County, the existing levels of air pollution are less than the applicable AAQS. T 191. Brevard County is an attainment area--the existing air quality is better than the levels allowed under the AAQS. T 191; Ex. 11 at TE-5. 18. Oleander analyzed the Project’s potential impacts on ambient air quality, in compliance with the applicable DEP requirements for such analyses. T 191-92. Oleander’s analyses were based on conservative assumptions that were intended to over-estimate the Project’s impacts. T 198; Ex. 10 at 2. For example, Oleander 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. T 198. 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. T 198.

19. Even with these conservative assumptions, Oleander’s analyses demonstrate that the Project’s maximum impacts on ambient air quality will be 0.6% or less of the applicable

AAQS for each criteria pollutant. T 197-98; Exs. 23, 25, 27. Since the AAQS are designed to protect public health and welfare, and the Project's impacts will be far less than the applicable AAQS, Oleander's analyses demonstrate that there will be a wide margin of safety for public health and welfare in this case. T 199.

20. The Project's maximum potential impacts are less than the EPA "significant impact" levels. T 183, 194-95; Ex. 11 at TE-10; Ex. 20. 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 the DEP's PSD review process. T 194-95; Ex. 11 at TE-8, TE-10.

21. The Project is located in an area that has been categorized in the PSD program as a "Class II" area. T 191. The Project's impacts on ambient air concentrations will be below all applicable PSD standards ("increments") for this Class II area. Ex. 20. The nearest PSD Class I area is the Chassahowitzka Wildlife Refuge ("Chassahowitzka"), which is approximately 180 kilometers from the Site. Ex. 1 at 7-1. An analysis of the Project's impacts on Chassahowitzka was not required because the Site is more than 150 kilometers away from Chassahowitzka. Ex. 1 at 6-1, 7-1. Given the great distance to Chassahowitzka, the Project's impacts on this PSD Class I area are expected to be insignificant. Ex. 1 at 7-1.

22. Although it was not required, Oleander evaluated the Project's impacts together with the impacts of the major sources of air pollution in the area (i.e., the Florida Power & Light Cape Canaveral Plant, the Orlando Utilities Commission's Indian River Plant and the Orlando Utilities Commission's Stanton Energy Center.) T 199, 205; Ex. 21. Oleander's analysis shows

that when all of these sources are considered together, the maximum impact from their combined emissions will be 50% or less of the applicable AAQS. T 205-06; Ex. 21. The Project itself will not have any measurable effect on the ambient conditions resulting from the operation of all these sources. T 206.

Ambient Air Quality Monitoring

23. Mr. Rowe suggested that Oleander should be required to install an ambient air monitor and measure ambient air quality in Brevard County prior to commencing construction of the Project. However, under DEP's PSD program, Oleander is not required to perform any ambient air quality monitoring for any pollutant prior to commencing construction of the Project because the Project's air quality impacts will be less than the applicable DEP "de minimis" levels. T 206-07; Ex. 1 at 6-7; Ex. 10 at 3-21; Ex. 11 at TE-8, TE-9; see DEP Rule 62-212.400(3)(e)1, F.A.C.

24. Mr. Rowe contends that Oleander should be required to monitor ambient ozone levels near the Site before commencing construction. Under the DEP's PSD program, preconstruction monitoring for ozone is not required unless a facility will have VOC emissions equal to or greater than 100 tons per year. Ex. 10; see DEP Rule 62-212.400(3)(e) and Table 212.400-3. In this case, the Project's maximum potential VOC emissions will be only 64 tons per year and, therefore, preconstruction monitoring for ozone is not required. T 222; Ex. 10; Ex. 11 at TE-11; Ex. 13. Accordingly, DEP's Draft Permit does not require Oleander to install any ozone monitors. See Ex. 11; see also Ex. 11 at TE-11, TE-12.

25. Requiring Oleander to conduct preconstruction or post-construction ozone monitoring is unnecessary and unjustified. Exs. 10, 13; T 208, 220. DEP already has installed two ambient air quality monitors in Brevard County to measure ozone concentrations. T 207. DEP also has ambient air quality monitors for ozone in Volusia, Seminole, Orange, Osceola, and St. Lucie Counties. T 207, 208. The ambient air quality data from these monitors demonstrate that the ozone concentrations in Brevard County are below the applicable AAQS. T 208. Further, the data demonstrate that ozone is a regional issue--i.e., the ozone levels in the region tend to rise and fall at the same time and to the same degree. T 207-08, 220; Ex. 10. An additional ozone monitoring station in Brevard County would provide no meaningful benefits when assessing whether Brevard County is meeting the AAQS for ozone. T 208, 220; Ex. 13.

26. Even if Oleander installed a new monitor, the Project's impacts on ozone and other ambient air quality parameters are so small that the impacts could not be measured with the monitor. T 206-07; Ex. 11 at TE-12. However, it would cost Oleander \$75,000 to \$100,000 per year to install and operate an ozone monitor. T 209.

27. In light of the foregoing facts, Oleander should not be required to install any new ambient air quality monitors. Ex. 11 at TE-11, TE-12; T 208, 220.

Impacts on Water Quality from Airborne Emissions

28. Mr. Rowe alleged that the Project's air emissions may adversely affect the water quality in the St. Johns River and the Indian River. However, Mr. Rowe did not introduce any competent, credible evidence to demonstrate that the Project's airborne emissions would adversely affect water quality in any water body.

29. DEP's PSD review process normally does not involve an evaluation of the impacts of a facility's air emissions on water quality. T 213, 235-36. Nonetheless, Oleander performed an assessment of this issue and demonstrated that the emissions from the Project will not cause any significant impact on water quality in water bodies in Brevard County. T 210, 213.

30. Oleander's assessment showed that there will be minimal, if any, "fallout" of particles into nearby waters. T 210. The maximum amount of nitrogen that could be deposited annually as a result of airborne NO_x emissions from the Project is 0.0007 grams/square meter (g/m²). T 210. By comparison, the current nitrogen deposition rate from other sources in the area is 0.4 g/m². T 211. Thus, the Project's impact on nitrogen deposition in the area will be only a very small fraction of the deposition that is occurring already. T 210-12.

Compliance with Air Standards

31. The airborne emissions from the Project will not cause or significantly contribute to a violation of any ambient air quality standard or PSD increment. T 193-94, 199, 234; Ex. 11 at TE-8. The Project complies with all applicable DEP air quality requirements, including the applicable policies, rules and statutes. T 215, 234; Ex. 11 at TE-6.

32. Oleander has provided reasonable assurance that the Project will be able to comply with all of the conditions and emissions limitations contained in the Draft Permit. T 174, 215, 237. Oleander will use General Electric ("GE") Frame 7FA combustion turbines. Ex. 10. GE has demonstrated that these turbines are capable of complying with the emission limits and requirements in the Draft Permit. T 174; Ex. 11 at BD-6, BD-7, BD-11. Oleander will be able to hire staff or train their own staff to operate the Project in compliance with the DEP permit limits.

T 174. Oleander's parent company already has a training program for its plant operators. T 174.

Oleander also has operated similar projects successfully. T 146.

Public Notice and Participation

33. Oleander and DEP provided various notices to the public concerning the Project. T 128-32; Exs. 7, 8, 12, 17, 31. DEP held two public meetings to receive public comments about the Project. T 231. DEP and Oleander published notice of both meetings. Exs. 7, 8, 12, 17, 31. Oleander also held neighborhood meetings and provided other opportunities for the public to comment about the Project. T 128; Ex. 31. These actions by DEP and Oleander have satisfied all of the applicable DEP requirements concerning public notice and public participation in the PSD review process. T 130, 232, 238-41.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this action. This proceeding was conducted in accordance with Sections 120.569 and 120.57(1), F.S. The parties were duly noticed for the hearing.

35. The issue for determination in this case is whether DEP should issue a Prevention of Significant Deterioration air construction permit to Oleander for the Project.

36. As the applicant in this proceeding, Oleander has the ultimate burden of persuasion. 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. See id., at 788. To prevail, Mr. Rowe must present "contrary evidence of equivalent quality" proving the truth of the

allegations in his petition. Id. at 789. Mr. Rowe cannot merely rely on 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, 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).

37. In this case, Oleander presented competent substantial evidence at the final hearing to demonstrate that: (a) DEP properly determined BACT for the Project; (b) the airborne emissions from the Project will not cause or significantly contribute to a violation of any ambient air quality standard or PSD increment; (c) the airborne emissions from the Project will not cause any significant adverse impacts on human health or the public welfare; (d) the Project satisfies all of the applicable DEP rules and criteria; and (e) the DEP should issue the air construction permit for the Project. Mr. Rowe speculated about potential impacts from the Project, but Mr. Rowe presented no competent, credible evidence to support the allegations in his petition.

RECOMMENDATION

Based upon the 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, therefore, RECOMMENDED:

That DEP enter a Final Order granting Oleander's application for a Prevention of Significant Deterioration air construction permit for the Project, subject to the conditions and limitations contained in DEP's Draft Permit.

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was mailed to:

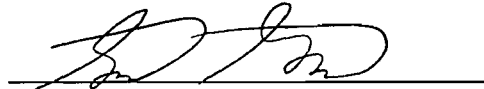
Clarence Rowe
418 Pennsylvania Avenue
Rockledge, Florida 32955

and

David S. Dee, Esquire
LANDERS & PARSONS, P.A.
310 West College Avenue
Post Office Box 271
Tallahassee, Florida 32302

on this 17th day of September 1999.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



SCOTT A. GOORLAND
Assistant General Counsel
Florida Bar No. 0066834

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Mail Station 35
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CLARENCE ROWE,)
)
 Petitioner,)
)
 vs.) Case No. 99-2581
)
 OLEANDER POWER PROJECT, L.P., and)
 DEPARTMENT OF ENVIRONMENTAL)
 PROTECTION,)
)
 Respondents.)
 _____)

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
418 Pennsylvania Avenue
Rockledge, Florida 32955

For Respondent, David S. Dee, Esquire
Oleander Power Landers & Parsons
Project, L.P.: 310 West College Avenue
Tallahassee, Florida 32301

For Respondent, Scott A. Goorland, Esquire
Department of W. Douglas Beason, Esquire
Environmental Assistant General Counsel
Protection: Department of Environmental Protection
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Mail Station 35
Tallahassee, Florida 32399-3000

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 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 ("SO₂"), sulfuric acid mist ("SAM"), volatile organic compounds ("VOCs"), particulate matter ("PM"), and particulate matter less than ten microns in diameter ("PM₁₀"). (PM and PM₁₀ are referred to herein as "PM/PM₁₀.") 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/PM₁₀, SO₂, 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 overestimate 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/m²"). By comparison, the current nitrogen deposition rate from other sources in the area is 0.4 g/m². 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
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of September, 1999.

COPIES FURNISHED:

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Tallahassee, Florida 32399-3000

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.

American Court Reporting - Orlando

Invoice

321 East Lane
 Sanford, Florida 32771
 Phone: 407 324-4290 Fax: 407 328-9712
 Employer ID - 156-36-3478

DATE 3/19/99 INVOICE # 99-1116

BILL TO

Ms. Kim Tober
 Department of Environmental Protection
 2600 Blair Stone Road
 Tallahassee, FL 32399-2400

RECEIVED
 MAR 22 1999
 BUREAU OF
 AIR REGULATION

DESCRIPTION	AMOUNT
3/3/99: Dale Bragg reported the public meeting in the matter of licensing the Oleander Power Plant in Cocoa	
Appearance Fee: 7:00 - 9:00 p.m.	33.00
Transcript Fee: 101 pp O+1 @ 2.25 per page	227.25
Postage and Handling:	4.30

P 230 731 691

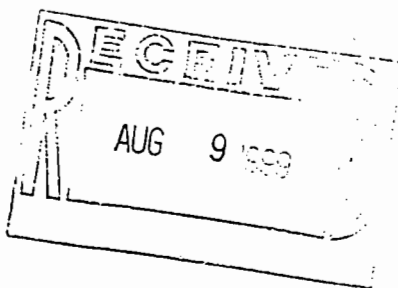
US Postal Service
Receipt for Certified Mail
 No Insurance Coverage Provided.
 Do not use for International Mail (See reverse)

Sent to	Kim Tober / DEP
Street & Number	2600 Blair Stone Road
Post Office, State, & ZIP Code	Tallahassee, FL 32399-2400
Postage	\$ 4.30
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	
Return Receipt Showing to Whom, Date, & Addressee's Address	
TOTAL Postage & Fees	\$ 4.30
Postmark or Date	

PS Form 3800, April 1995

Contract # 97181 \$18 first hr, \$15 each hr after first. After 5 p.m. \$20 first hour

Total \$264.55



DSD

August 6, 1999

Mr. Daniel Manry
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

FAX to
- Logan Spielvogel
Rick W.
Armin E. "Al" Lewis
Frank S.
Richard Z.
Doug Brown - DSD
F.Y.I.
David D.

Dear Judge Manry:

This is in regard to Case No. 99-2581, Clarence Rowe, Petitioner.

First, I have two questions regarding the hearing:

1. Is the hearing open to the public?
2. Can a person from the general public introduce testimony before the judge? If yes, how do they go about arranging this?

Second, I request a VHS tape playback system be available in the hearing room. I will be presenting video-taped evidence.

Third, I request that Mr. Richard L. Wolfinger, Vice President, Oleander Power Project be subpoenaed as a witness. I plan on questioning Mr. Wolfinger in support of my case.

Yours truly,

Clarence Rowe

Clarence Rowe

Copy to:

David Dee, Esquire
Landers & Parsons, P.A.
Post Office Box 271
Tallahassee, FL 32302-0271

RECEIVED

AUG 13 1999

BUREAU OF AIR REGULATION

DEP FILE NO. 0090180-001-AC
(PSD - FL - 258)

In re: The Matter of
OLEANDER POWER PROJECT L.P.
OLEANDER POWER PROJECT - Unit Nos. 1-5
BREVARD COUNTY

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

PETITION FOR ADMINISTRATIVE HEARING

The Petitioners, by and through the undersigned attorney, file this Petition for an Administrative Hearing with the State of Florida Department of Environmental Protection on this the 12th day of April, 1999, showing as follows:

1. This Petition is filed in response to the Department's Public Notice of Intent to Issue Air Construction Permit, dated on or about March 29, 1999;
2. The name and address of each Petitioner is as follows:
 - a. *Brevard Citizens Against Pollution, Inc.*, (BCAP) a Florida not-for-profit corporation, 824 Herron Road, Cocoa, FL; (no telephone number);
 - b. *Craig Bock*, 865 Clifton Cove's Court, Cocoa, FL 32926; (407) 632-4344;
 - c. *Robert J. Knodel*, 824 Herron Road, Cocoa, FL 32926; (407) 631-0728;
 - d. *Douglas H. Sphar*, 819 Herron Road, Cocoa, FL; (407) 636-0701;
 - e. *Robert and Marlene Waters*, 5060 Palm Avenue, Cocoa, FL; (407) 639-4357;
3. The name and address of the Applicant is as follows:

Oleander Power Project, L.P.
Richard L. Wolfinger, Vice-President
250 West Pratt Street, 23rd Floor
Baltimore, MD 21201

4. The proposed project will be in Brevard County, Florida, and has been assigned DEP Permit Number 0090180-001-AC (PSD-FL-258);
5. The manner in which the Petitioners received notice of the Department's proposed action is as follows:
 - a. Petitioners BCAP, Bock, Knodel, and Waters via electronic mail, Halpin to R. Knodel, et al, *March 29, 1999*;
 - b. Petitioner Sphar via article in *Florida Today* newspaper, *March 30, 1999*;
6. The Department's proposed action to issue an Air Construction Permit will affect the substantial interests of the Petitioners in the following way(s):

BCAP directors and members are residents of central Brevard County. Petitioners Knodel, Sphar, and Bock reside within 3 kilometers of the applicant's proposed facility. Petitioners Waters reside within 5.6 kilometers of the applicant's proposed facility. The petitioners contend that their health, well being, and quality of life will be significantly damaged by air emissions from the applicant's proposed project. The petitioners will suffer economic harm due to reduced property values as a consequence of close proximity to a facility that is classified as a Major or Title V Source of air pollution.

7. The material facts set forth in the Public Notice which are disputed by the petitioners include the following:

The petitioners dispute the findings of the Florida Department of Environmental Protection, herein referred to as DEP, that the applicant has demonstrated the proposed facility will not cause or contribute to, air pollution in excess of any: (a) maximum allowable increase or maximum allowable concentration for any pollutant in stipulated in the Clean Air Act of the United States, (b) the national air quality standard that is applicable for the region of the proposed project, or any other applicable emission standard or standard of performance under the Clean Air Act of the United States.

8. The Petitioners would contend that the following facts warrant reversal or modification of the Department's Intent to Issue Air Construction Permit:

- a. The petitioners contend that the DEP, acting as authorized agent of the federal government, has not done due diligence in the oversight, verification, validation, and review of the Ambient Air Quality Analysis (AAQA) that was performed by the applicant and submitted in support of its air construction permit application.

- b. The petitioners contend that the DEP should not have waived the requirement for the applicant to perform pre-construction ambient air monitoring in support of his AAQA.

wrong

c. The petitioners contend that the applicant has not adequately demonstrated or proven that the proposed project will not adversely impact or exceed air quality standards set forth in the Clean Air Act of the United States.

Wrong

d. The petitioners contend that the applicant has not been given sufficient restriction or disincentive on the combustion of distillate oil. In public meetings, the applicant has stated that the proposed facility will not operate more than 800 hours per year and they will use 18 to 21 million gallons of water per year. The applicant stated that water is primarily consumed during combustion of distillate oil. The projected high water consumption infers extensive combustion of distillate oil.

e. The petitioners contend that the applicant has not applied Best Available Control Technology to the control of nitrogen oxides (NOx) while combusting distillate oil. The applicant states control to 42 parts per million (ppm) NOx on oil but alternate equipment suppliers will warrant 25 ppm NOx on oil.

f. In public statements to the press, the DEP has said that Central Florida is close to achieving non-attainment status with regard to ozone. The petitioners contend that the applicant's proposed facility is a significant emitter, as defined in Code of Federal Regulations, Title 40, Part 52.21, of constituents to the formation of ozone.

9. The rules or statutes that the Petitioners contend require a reversal or modification or the DEP actions include the following:

The petitioners contend that the DEP has not followed the letter or spirit of the Clean Air Act of the United States, Title I, Part C, Section 165, Subsection 3 which states: "the owner or operator of such facility demonstrates, as required pursuant to section 110(j), that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this Act;"

The petitioners contend that the DEP has not followed the letter or spirit of the Clean Air Act of the United States, Title I, Part C, Section 165, Subsection 7 which states: "the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source;"

10. The relief sought by Petitioners through this Request for Administrative Hearing includes the following:

- a. Provide evidence that the DEP has written policies and procedures for the validation and verification of computer models and simulations that are used by air permit applicants in their conduct of the AAQA.
- b. Provide evidence, such as reports, minutes, memoranda for file, etc., that this applicant's computer model was verified and validated in accordance with the policies and procedures of (a).
- c. Provide evidence that the DEP has written policies and procedures for the review and approval of AAQAs.

- d. Provide evidence, such as reports, minutes, memoranda for file, etc., that this applicant's assumed or estimated baseline ambient atmosphere that formed the basis for the input data set to the applicant's AAQA, was reviewed by the DEP and deemed correct and proper for the purposes of the AAQA.
- e. Provide evidence, such as reports, minutes, memoranda for file, etc., that the DEP reviewed and concurs in the computer model's options and switches that were selected by the applicant for use in the AAQA, as mandated by Code of Federal Regulations, Title 40, Part 52.21.
- f. Provide evidence, such as reports, minutes, memoranda for file, etc., that the DEP conducted a comprehensive review of the results of the applicant's AAQA.
- g. Require the applicant to perform at least one year of pre-construction monitoring of the pollutants identified in the Code of Federal Regulations, Title 40, Part 52.21. Monitoring shall be in accordance with the United States Environmental Protection Agency (EPA) document *Ambient Monitoring Guidelines for Prevention of Significant Deterioration*.
- h. Require the applicant to use the measured data of (g) in his revised AAQA prior to issuance of a construction permit.
- i. Review and approve the AAQA that uses the data from (g).
- j. Restrict the hours of combustion of distillate oil to a maximum 30 percent of the projected total operating hours per calendar year. If this percentage is exceeded in a calendar year, the next calendar year's combustion of distillate oil shall be reduced by the number of hours in excess of 30 percent.

WHEREFORE, it is respectfully requested that the Department grant an Administrative Review Hearing pursuant to sections 120.569 and 120.57, Florida Statutes (1997) for any and all lawful purposes, including but not limited to reviewing, reconsidering and modifying the previously-issued Notice of Intent to Issue Air Construction Permit to the Applicant at the Brevard County site.

I HEREBY CERTIFY that on this the 12th day of April, 1999, the original of the foregoing Petition for Administrative Hearing was forwarded by first-class United States Mail to the Office of the General Counsel of the Department of Environmental Protection, 3900 Commonwealth Blvd., Mail Station #35, Tallahassee, FL 32399-3000; and via facsimile transmission to (850) 487-4938; and that a true and correct copy was mailed to the Applicant at the address listed in paragraph 3 above.



JOHN M. HARRIS
STADLER & HARRIS, P.A.
1820 Garden Street
Titusville, FL 32796
(407) 264-8800

Petition for Administrative Hearing

Petitioners:

Robert C. and Marlene A. Waters
5060 Palm Avenue
Cocoa, FL 32926
Telephone: (407) 639-4357 (home) or (407) 268-0923 (business)

Applicant:

Oleander Power Project, L.P.
Mr. Richard L. Wolfinger, Vice President
250 West Pratt Street, 23rd Floor
Baltimore, MD 21201

Permit File Number: DEP File No. 0090180-001-AC (PSD-FL-258)

County in Which Project is Proposed: Brevard

Statement of how petitioners received notice:

Via electronic mail, Halpin to R. Knodel, et al, March 29, 1999

Statement of when petitioners received notice:

Via electronic mail, Halpin to R. Knodel, et al, March 29, 1999

Statements of how petitioner's substantial interests are affected by proposed action:

The petitioners are residents of central Brevard County who resides within 3 kilometers of the applicant's proposed facility. The petitioner contends that his health, well being, and quality of life will be significantly damaged by air emissions from the applicant's proposed project. The petitioner will suffer economic harm due to reduced property values as a consequence of close proximity to a facility that is classified as a Major or Title V Source of air pollution.

Statement of material facts disputed by the petitioners:

The petitioner disputes the findings of the Florida Department of Environmental Protection, herein referred to as DEP, that the applicant has demonstrated the proposed facility will not cause or contribute to, air pollution in excess of any: (a) maximum allowable increase or maximum allowable concentration for any pollutant in stipulated in the Clean Air Act of the United States, (b) the national air quality standard that is applicable for the region of the proposed project, or any other applicable emission standard or standard of performance under the Clean Air Act of the United States.

Statement of the facts the petitioners contend warrants reversal or modification:

The petitioner contends that the DEP, acting as authorized agent of the federal government, has not done due diligence in the oversight, verification, validation, and review of the Ambient Air Quality Analysis (AAQA) that was performed by the applicant and submitted in support of his air construction permit application.

The petitioners contend that the DEP should not have waived the requirement for the applicant to perform pre-construction ambient air monitoring in support of his AAQA.

The petitioners contend that the applicant has not adequately demonstrated or proven that the proposed project will not adversely impact or exceed air quality standards set forth in the Clean Air Act of the United States.

The petitioners contend that the applicant has not been given sufficient restriction or disincentive on the combustion of distillate oil. In public meetings, the applicant has stated that the proposed facility will not operate more than 800 hours per year and they will use 18 to 21 million gallons of water per year. The applicant stated that water is primarily consumed during combustion of distillate oil. The projected high water consumption infers extensive combustion of distilled oil.

The petitioners contend that the applicant has not applied Best Available Control Technology to the control of nitrogen oxides (NO_x) while combusting distillate oil. The applicant states control to 42 parts per million (ppm) NO_x on oil but alternate equipment suppliers will warrant 25 ppm NO_x on oil.

In public statements to the press, the DEP has said that Central Florida is close to achieving non-attainment status with regard to ozone. The petitioners contend that the applicant's proposed facility is a significant emitter, as defined in Code of Federal Regulations, Title 40, Part 52.21, of constituents to the formation of ozone.

Statement of the rules or statutes that the petitioner contends requires a reversal or modification or the DEP actions:

The petitioners contend that the DEP has not followed the letter or spirit of the Clean Air Act of the United States, Title I, Part C, Section 165, Subsection 3 which states: "the owner or operator of such facility demonstrates, as required pursuant to section 110(j), that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this Act;"

The petitioners contend that the DEP has not followed the letter or spirit of the Clean Air Act of the United States, Title I, Part C, Section 165, Subsection 7 which states: "the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source;"

Statement of relief sought by the petitioners:

- a. Provide evidence that the DEP has written policies and procedures for the validation and verification of computer models and simulations that are used by air permit applicants in their conduct of the AAQA.
- b. Provide evidence, such as reports, minutes, memoranda for file, etc., that this applicant's computer model was verified and validated in accordance with the policies and procedures of (a).
- c. Provide evidence that the DEP has written policies and procedures for the review and approval of AAQAs.
- d. Provide evidence, such as reports, minutes, memoranda for file, etc., that this applicant's assumed or estimated baseline ambient atmosphere that formed the basis for the input data set to the applicant's AAQA, was reviewed by the DEP and deemed correct and proper for the purposes of the AAQA.
- e. Provide evidence, such as reports, minutes, memoranda for file, etc., that the DEP reviewed and concurs in the computer model's options and switches that were selected by the applicant for use in the AAQA that is mandated by Code of Federal Regulations, Title 40, Part 52.21.
- f. Provide evidence, such as reports, minutes, memoranda for file, etc., that the DEP conducted a comprehensive review of the results of the applicant's AAQA.
- g. Require the applicant to perform at least one year of pre-construction monitoring of the pollutants identified in the Code of Federal Regulations, Title 40, Part 52.21. Monitoring shall be in accordance with the United States Environmental Protection Agency (EPA) document *Ambient Monitoring Guidelines for Prevention of Significant Deterioration*.
- h. Require the applicant to use the measured data of (g) in his revised AAQA prior to issuance of a construction permit.
 - i. Review and approve the AAQA that uses the data from (g).
 - j. Restrict the hours of combustion of distillate oil to a maximum 30 percent of the projected total operating hours per calendar year. If this percentage is exceeded in a calendar year, the next calendar year's combustion of distillate oil shall be reduced by the number of hours in excess of 30 percent.

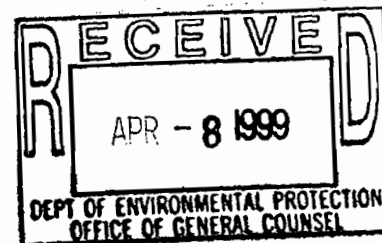
PETITION FOR ADMINISTRATIVE HEARING

Petitioner:

Michael H. Stallings
121 Rosewood Dr.
Cocoa, Florida, 32926
President, Forest Lakes of Cocoa, a Condominium
Phone 407-636-3619
Fax 407-631-4801

Applicant:

Oleander Power Project, L.P.
Mr. Richard L. Wolfinger, VP
250 Pratt St. 23rd Floor
Baltimore, MD. 21201



Permit File Number: DEP File NR. 0090180-001-AC (PSD-FL-258)

Proposed Project to be located in Brevard County, Florida

Notice received by electronic mail from DEP on 29 Mar 1999.

Substantial interests of myself and the residents of Forest Lakes of Cocoa, a Condominium, are affected by this project. Forest Lakes is a 246 unit condominium located one mile south west of the proposed project. We contend that the health, well being, property values and quality of life of each unit owner will be significantly damaged by air emissions from the applicant's proposed project. We further contend that the quality of the 38-acre fresh water lake that comprises the condominium's major asset could also be damaged or degraded by fallout from this project.

Facts disputed by petitioner: We dispute the findings of the Florida Department of Environmental Protection, (DEP) that the applicant has demonstrated the proposed facility will not cause or contribute to air pollution in excess of any maximum allowable increase or maximum allowable concentration for any pollutant stipulated in the Clean Air Act of the United States.


Facts we contend warrant reversal or modification: We contend that the DEP should not have waived the requirement for the applicant to perform pre-construction ambient air monitoring in support of his air construction permit application. We further contend that the applicant has not adequately demonstrated or proven that the proposed project will not adversely impact or exceed air quality standards set forth in the Clean Air Act of the United States. We have had our lake tested each month for the past 9 years by the University of Florida Lake Watch Program. This lake is in the top 10% for cleanliness, fishing, swimming and general use. We contend that the applicant has made no study of the impact of emissions fallout on the quality of our lake. We also contend that the DEP has not placed sufficient restrictions on the use of fuel oil during the operation of this plant.

Rules or statutes that we believe require reversal or modification of DEP actions: We contend that the DEP has not followed the letter and spirit of the Clean Air Act of the United States, Title 1, Part C, Section 165, Subsection 3 which states: "the owner or operator of such facility demonstrates, as required pursuant section 110(j), that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum

allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality region, or (C) any other applicable emission standard or standard of performance under this Act.” We also contend that the DEP has not followed the letter and spirit of the Clean Air Act of the United States, Title 1, Part C, Section 165, Subsection 7 which states: “the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source;”

Petitioner seeks the following relief.

1. Require the applicant to perform at least one year of pre-construction monitoring of the pollutants identified in the Code of Federal Regulations, Title 40, Part 52.21.
2. Conduct a study on the impact of expected fallout on the lake at Forest Lakes.
3. Restrict the hours of combustion of fuel oil to a maximum of 20% of the total operating hours per calendar year. Should this percentage be exceeded in any calendar year, the next year's oil combustion hours would be reduced by that number of hours over 20%.


Michael H. Stallings
President
Forest Lakes of Cocoa, a condominium

Petition for Administrative Hearing

Petitioner:

Craig Bock
865 Clifton's Cove Court
Cocoa, FL 32926
Telephone: (407) 632-4344

Applicant:

Oleander Power Project, L.P.
Mr. Richard L. Wolfinger, Vice President
250 West Pratt Street, 23rd Floor
Baltimore, MD 21201

Permit File Number: DEP File No. 0090180-001-AC (PSD-FL-258)

County in Which Project is Proposed: Brevard

Statement of how petitioners received notice:

Via electronic mail, Halpin to R. Knodel, et al, March 29, 1999

Statement of when petitioners received notice:

Via electronic mail, Halpin to R. Knodel, et al, March 29, 1999

Statements of how petitioner's substantial interests are affected by proposed action:

The petitioner is a resident of central Brevard County who resides within 3 kilometers of the applicant's proposed facility. The petitioner contends that his health, well being, and quality of life will be significantly damaged by air emissions from the applicant's proposed project. The petitioner will suffer economic harm due to reduced property values as a consequence of close proximity to a facility that is classified as a Major or Title V Source of air pollution.

Statement of material facts disputed by the petitioners:

The petitioner disputes the findings of the Florida Department of Environmental Protection, herein referred to as DEP, that the applicant has demonstrated the proposed facility will not cause or contribute to, air pollution in excess of any: (a) maximum allowable increase or maximum allowable concentration for any pollutant in stipulated in the Clean Air Act of the United States, (b) the national air quality standard that is applicable for the region of the proposed project, or any other applicable emission standard or standard of performance under the Clean Air Act of the United States.

Statement of the facts the petitioners contend warrants reversal or modification:

The petitioner contends that the DEP, acting as authorized agent of the federal government, has not done due diligence in the oversight, verification, validation, and review of the Ambient Air Quality Analysis (AAQA) that was performed by the applicant and submitted in support of his air construction permit application.

The petitioner contends that the DEP should not have waived the requirement for the applicant to perform pre-construction ambient air monitoring in support of his AAQA.

The petitioner contends that the applicant has not adequately demonstrated or proven that the proposed project will not adversely impact or exceed air quality standards set forth in the Clean Air Act of the United States.

The petitioner contends that the applicant has not been given sufficient restriction or disincentive on the combustion of distillate oil. In public meetings, the applicant has stated that the proposed facility will not operate more than 800 hours per year and they will use 18 to 21 million gallons of water per year. The applicant stated that water is primarily consumed during combustion of distillate oil. The projected high water consumption infers extensive combustion of distilled oil.

The petitioner contends that the applicant has not applied Best Available Control Technology to the control of nitrogen oxides (NOx) while combusting distillate oil. The applicant states control to 42 parts per million (ppm) NOx on oil but alternate equipment suppliers will warrant 25 ppm NOx on oil.

In public statements to the press, the DEP has said that Central Florida is close to achieving non-attainment status with regard to ozone. The petitioners contend that the applicant's proposed facility is a significant emitter, as defined in Code of Federal Regulations, Title 40, Part 52.21, of constituents to the formation of ozone.

Statement of the rules or statutes that the petitioner contends requires a reversal or modification or the DEP actions:

The petitioner contends that the DEP has not followed the letter or spirit of the Clean Air Act of the United States, Title I, Part C, Section 165, Subsection 3 which states: "the owner or operator of such facility demonstrates, as required pursuant to section 110(j), that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this Act;"

The petitioner contends that the DEP has not followed the letter or spirit of the Clean Air Act of the United States, Title I, Part C, Section 165, Subsection 7 which states: "the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source;"

Statement of relief sought by the petitioner:

- a. Provide evidence that the DEP has written policies and procedures for the validation and verification of computer models and simulations that are used by air permit applicants in their conduct of the AAQA.
- b. Provide evidence, such as reports, minutes, memoranda for file, etc., that this applicant's computer model was verified and validated in accordance with the policies and procedures of (a).
- c. Provide evidence that the DEP has written policies and procedures for the review and approval of AAQAs.
- d. Provide evidence, such as reports, minutes, memoranda for file, etc., that this applicant's assumed or estimated baseline ambient atmosphere that formed the basis for the input data set to the applicant's AAQA, was reviewed by the DEP and deemed correct and proper for the purposes of the AAQA.
- e. Provide evidence, such as reports, minutes, memoranda for file, etc., that the DEP reviewed and concurs in the computer model's options and switches that were selected by the applicant for use in the AAQA that is mandated by Code of Federal Regulations, Title 40, Part 52.21.
- f. Provide evidence, such as reports, minutes, memoranda for file, etc., that the DEP conducted a comprehensive review of the results of the applicant's AAQA.
- g. Require the applicant to perform at least one year of pre-construction monitoring of the pollutants identified in the Code of Federal Regulations, Title 40, Part 52.21. Monitoring shall be in accordance with the United States Environmental Protection Agency (EPA) document *Ambient Monitoring Guidelines for Prevention of Significant Deterioration*.
- h. Require the applicant to use the measured data of (g) in his revised AAQA prior to issuance of a construction permit.
- i. Review and approve the AAQA that uses the data from (g).
- j. Restrict the hours of combustion of distillate oil to a maximum 30 percent of the projected total operating hours per calendar year. If this percentage is exceeded in a calendar year, the next calendar year's combustion of distillate oil shall be reduced by the number of hours in excess of 30 percent.

Douglas H. Sphar

April 9, 1999

Department of Environmental Protection
Office of General Counsel
3900 Commonwealth Boulevard, MS 35
Tallahassee, FL 32399-3000

Re: Oleander Power Project; DEP File No. 009-180-001-AC (PSD-FL-258)

Dear Sir:

Please find attached my petition for an Administrative Hearing relative to the referenced DEP permitting action.

Yours truly,



819 Heron Road
Cocoa, FL 32926-2320

Petition for Administrative Hearing

Petitioner:

Douglas H. Sphar
819 Heron Road
Cocoa, FL 32926
Telephone: (407) 636-0701

Applicant:

Oleander Power Project, L.P.
Mr. Richard L. Wolfinger, Vice President
250 West Pratt Street, 23rd Floor
Baltimore, MD 21201

Permit File Number: DEP File No. 0090180-001-AC (PSD-FL-258)

County in Which Project is Proposed: Brevard

Statement of how petitioners received notice:

Via article in *Florida Today* newspaper, March 30, 1999

Statement of when petitioners received notice:

Via article in *Florida Today* newspaper, March 30, 1999

Statements of how petitioner's substantial interests are affected by proposed action:

The petitioner is a resident of central Brevard County who resides within 3 kilometers of the applicant's proposed facility. The petitioner contends that his health, well being, and quality of life will be significantly damaged by air emissions from the applicant's proposed project. The petitioner will suffer economic harm due to reduced property values as a consequence of close proximity to a facility that is classified as a Major or Title V Source of air pollution.

Statement of material facts disputed by the petitioners:

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Statement of the facts the petitioners contend warrants reversal or modification:

The petitioner contends that the DEP, acting as authorized agent of the federal government, has not done due diligence in the oversight, verification, validation, and review of the Ambient Air Quality Analysis (AAQA) that was performed by the applicant and submitted in support of his air construction permit application.

The petitioner contends that the DEP should not have waived the requirement for the applicant to perform pre-construction ambient air monitoring in support of his AAQA.

The petitioner contends that the applicant has not adequately demonstrated or proven that the proposed project will not adversely impact or exceed air quality standards set forth in the Clean Air Act of the United States.

The petitioner contends that the applicant has not been given sufficient restriction or disincentive on the combustion of distillate oil. In public meetings, the applicant has stated that the proposed facility will not operate more than 800 hours per year and they will use 18 to 21 million gallons of water per year. The applicant stated that water is primarily consumed during combustion of distillate oil. The projected high water consumption infers extensive combustion of distilled oil.

The petitioner contends that the applicant have not applied Best Available Control Technology to the control of nitrogen oxides (NOx) while combusting distillate oil. The applicant states control to 42 parts per million (ppm) NOx on oil but alternate equipment suppliers will warrant 25 ppm NOx on oil.

In public statements to the press, the DEP has said that Central Florida is close to achieving non-attainment status with regard to ozone. The petitioners contend that the applicant's proposed facility is a significant emitter, as defined in Code of Federal Regulations, Title 40, Part 52.21, of constituents to the formation of ozone.

Statement of the rules or statutes that the petitioner contends requires a reversal or modification or the DEP actions:

The petitioner contends that the DEP has not followed the letter or spirit of the Clean Air Act of the United States, Title I, Part C, Section 165, Subsection 3 which states: "the owner or operator of such facility demonstrates, as required pursuant to section 110(j), that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this Act;"

The petitioner contends that the DEP has not followed the letter or spirit of the Clean Air Act of the United States, Title I, Part C, Section 165, Subsection 7 which states: "the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source;"

Statement of relief sought by the petitioner:

- a. Provide evidence that the DEP has written policies and procedures for the validation and verification of computer models and simulations that are used by air permit applicants in their conduct of the AAQA.
- b. Provide evidence, such as reports, minutes, memoranda for file, etc., that this applicant's computer model was verified and validated in accordance with the policies and procedures of (a).
- c. Provide evidence that the DEP has written policies and procedures for the review and approval of AAQAs.
- d. Provide evidence, such as reports, minutes, memoranda for file, etc., that this applicant's assumed or estimated baseline ambient atmosphere that formed the basis for the input data set to the applicant's AAQA, was reviewed by the DEP and deemed correct and proper for the purposes of the AAQA.
- e. Provide evidence, such as reports, minutes, memoranda for file, etc., that the DEP reviewed and concurs in the computer model's options and switches that were selected by the applicant for use in the AAQA that is mandated by Code of Federal Regulations, Title 40, Part 52.21.
- f. Provide evidence, such as reports, minutes, memoranda for file, etc., that the DEP conducted a comprehensive review of the results of the applicant's AAQA.
- g. Require the applicant to perform at least one year of pre-construction monitoring of the pollutants identified in the Code of Federal Regulations, Title 40, Part 52.21. Monitoring shall be in accordance with the United States Environmental Protection Agency (EPA) document *Ambient Monitoring Guidelines for Prevention of Significant Deterioration*.
- h. Require the applicant to use the measured data of (g) in his revised AAQA prior to issuance of a construction permit.
- i. Review and approve the AAQA that uses the data from (g).
- j. Restrict the hours of combustion of distillate oil to a maximum 30 percent of the projected total operating hours per calendar year. If this percentage is exceeded in a calendar year, the next calendar year's combustion of distillate oil shall be reduced by the number of hours in excess of 30 percent.

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

MICHAEL H. STALLINGS,

Petitioner,

vs.

OGC CASE NO. 99-0564
DOAH CASE NO. 99-1773

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

Respondents.

BREVARD CITIZENS AGAINST
POLLUTION, INC.,

Petitioner,

vs.

OGC CASE NO. 99-0574
DOAH CASE NO. 99-1774

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

Respondents.

CRAIG BOCK,

Petitioner,

vs.

OGC CASE NO. 99-0618
DOAH CASE NO. 99-1775

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

Respondents.

RECEIVED

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BUREAU OF
AIR REGULATION

ROBERT J. KNODEL,

Petitioner,

vs.

**OGC CASE NO. 99-0620
DOAH CASE NO. 99-1776**

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

Respondents.

DOUGLAS H. SPHAR,

Petitioner,

vs.

**OGC CASE NO. 99-0621
DOAH CASE NO. 99-1777**

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

Respondents.

ROBERT and MARLENE WATERS,

Petitioners,

vs.

**OGC CASE NO. 99-0622
DOAH CASE NO. 99-1778**

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

Respondents.

ORDER CLOSING FILES

On April 8, 1999, the Florida Department of Environmental Protection (Department) received several petitions for administrative hearing from above referenced Petitioners. The petitions challenged the Department's Intent to Issue Permit No. 0090180-001-AC to Oleander

Power Project, L.P, to construct five 190-MW dual-fuel "F" class construction turbines and two 2.8 million gallon fuel oil storage tanks, in Brevard County.

On June 17, 1999, after receiving Notices of Voluntary Dismissal, the assigned administrative law judge issued an order closing the files of the Division of Administrative Hearings and relinquishing jurisdiction back to the Department. See Exhibit 1. There being no further matters to consider,

IT IS ORDERED:

The petitions having been withdrawn, the Department's file in this matter is closed.

Any party to this order has the right to seek judicial review of the order under section 120.68 of the Florida Statutes by the filing of a notice of appeal under rule 9.110 of the Florida Rules of Appellate Procedure with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, Mail Station 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.

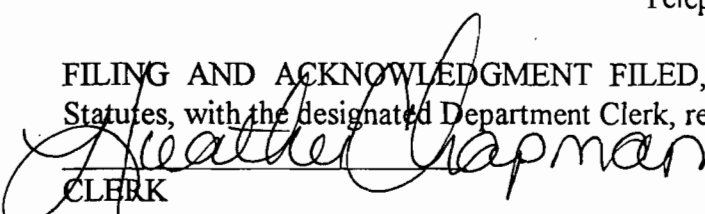
DONE AND ORDERED this 28 day of June, 1999, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION


E. PERRY ODOM
General Counsel

Douglas Building
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000
Telephone: (850) 488-9314

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.


CLERK

6-29-99
DATE

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was mailed to:

Michael H. Stallings
121 Rosewood Drive
Cocoa Beach, Florida 32926

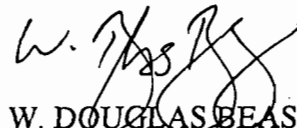
John M. Harris, Esquire
Stadler & Harris, P.A.
1820 Garden Street
Titusville, Florida 32796

David Dee, Esquire
Landers & Parsons, P.A.
Post Office Box 271
Tallahassee, Florida 32302-0271

Clarence Rowe
418 Pennsylvania Avenue
Rockledge, Florida 32955

on this 30th day of June, 1999.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



W. DOUGLAS BEASON
Florida Bar No. 379239
Assistant General Counsel

3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000
Telephone: (850) 488-9314

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT J. KNODEL,)	
)	
Petitioner,)	
)	
vs.)	Case No. 99-1776
)	
OLEANDER POWER PROJECT, L.P.,)	
and DEPARTMENT OF ENVIRONMENTAL)	
PROTECTION,)	
)	
Respondents.)	
<hr/>		
DOUGLAS H. SPHAR,)	
)	
Petitioner,)	
)	
vs.)	Case No. 99-1777
)	
OLEANDER POWER PROJECT, L.P.,)	
and DEPARTMENT OF ENVIRONMENTAL)	
PROTECTION,)	
)	
Respondents.)	
<hr/>		
ROBERT and MARLENE WATERS,)	
)	
Petitioners,)	
)	
vs.)	Case No. 99-1778
)	
OLEANDER POWER PROJECT, L.P.,)	
and DEPARTMENT OF ENVIRONMENTAL)	
PROTECTION,)	
)	
Respondents.)	
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ORDER CLOSING FILES

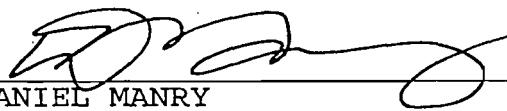
THIS CAUSE came on for consideration upon Petitioners' Notice of Voluntary Dismissal filed on June 15, 1999. Having reviewed the record in this proceeding and being advised in the premises, it is

ORDERED that:

1. The files of the Division of Administrative Hearings are CLOSED.

2. This matter is returned to the referring agency for final disposition.

DONE AND ORDERED this 17th day of June, 1999, in Tallahassee, Leon County, Florida.


DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of June, 1999.

COPIES FURNISHED:

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1820 Garden Street
Titusville, Florida 32796

Michael H. Stallings
121 Rosewood Drive
Cocoa Beach, Florida 32926

JUL-19-99 01:16P

Petition for Administrative Hearing

Petitioner:

Clarence Rowe
418 Pennsylvania Ave.
Rockledge, FL 32955
Telephone: (407) 636-8762

Applicant:

Oleander Power Project, L.P.
Mr. Richard L. Wolfinger, Vice President
250 West Pratt Street, 23rd Floor
Baltimore, MD 21201

Permit File Number: DEP File No. 0090180-001-AC (PSD-FL-258)

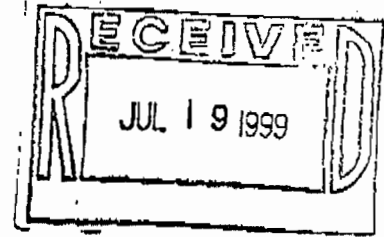
County in Which Project is Proposed: Brevard

Statement of how petitioner received notice:

An article in "Florida Today" newspaper, March 30, 1999

Statement of when petitioner received notice:

An article in "Florida Today" newspaper, March 30, 1999



Statements of how petitioner's substantial interests are affected by proposed action:

I, Clarence Rowe, the petitioner, believe that the health, well being, and quality of life of my family, grand children, and citizens of Brevard County will be significantly damaged by air emissions from the applicant's proposed project.

Statement of material facts disputed by the petitioner:

The petitioner disputes the findings of the Florida Department of Environmental Protection, herein referred to as DEP, that the applicant has demonstrated the proposed facility will not cause or contribute to, air pollution in excess of any: (a) maximum allowable increase or maximum allowable concentration for any pollutant stipulated in the Clean Air Act of the United States, (b) the national air quality standard that is applicable for the region of the proposed project, or any other applicable emission standard or standard of performance under the Clean Air Act of the United States.

Statement of the facts the petitioner contends warrants reversal or modification:

The petitioner believes the applicant's proposed facility falls within the definitions and regulations of Environmental Injustice because there are economically disadvantaged and minority communities within close proximity to the facility's site.

The petitioner believes the applicant has not adequately demonstrated or proven that the proposed project will not adversely impact or exceed air quality standards set forth in the Clean Air Act of the United States.

The petitioner believes the DEP has not adequately evaluated the applicant's Ambient Air Quality Analysis (AAQA).

The petitioner believes the DEP has not adequately evaluated the applicant's Ambient Air Quality Analysis (AAQA).

Statement of the rules or statutes that the petitioner contends requires a reversal or modification or the DEP actions:

The petitioner believes the DEP has not followed the letter or spirit of the Clean Air Act of the United States, Title I, Part C, Section 165, Subsection 3 which states: "the owner or operator of such facility demonstrates, as required pursuant to section 110(j), that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this Act;"

Statement of relief sought by the petitioner:

- a. The petitioner believes the permit for the applicant's proposed facility should be disallowed for reasons of Environmental Injustice. Brevard County already has two power plants and a boat fabrication facility within approximately eight miles of the proposed site. These three facilities are Title V emitters of air pollutants. Under the concept of Environmental Injustice, the applicant's proposed site is an area of concern. Brevard County already has too much pollution without adding the applicant's facility. Fortunately, NASA launch fallout is mostly offshore; however, FPL and OUC utilities lay down considerable visible plume that blows over land. The applicant's site location will deposit most of the fallout across residential neighborhoods and then into the St. Johns River or Indian River. During a and southwest wind flow, the applicant's plant and FPL plant will have overlapping plume patterns, thus increasing concentrations of fallout. Were there a compelling need in Brevard County for this plant, we could better understand the location; however, lacking a compelling need, this appears to be a crass commercial venture foisted upon a minority community and low-income populations, because they are without political muscle to prevent the act. Under the concept of Environmental Injustice you are requested to deny any permit for the proposed facility, or to request the appropriate governmental agency with proper jurisdiction and authority to determine the Environmental Justice issue. The petitioner requests a full investigation and hearing on the current air quality in the area of the proposed facility and along term projection of air quality in the area of the proposed facility prior to permitting any additional air polluters.
- b. The petitioner requests evidence that the DEP requested sufficient data from the applicant to duplicate the applicant's AAQA.
- c. The petitioner requests evidence that the DEP duplicated the applicant's AAQA.
- d. The applicant's air permit application states that the applicant used estimated pollutant concentrations in performing his AAQA. The petitioner requests evidence that DEP requested and reviewed an analysis that supports the applicant's estimates.
- e. The petitioner requests DEP to explain why the official record as documented in the Intent to Issue an Air Permit shows no official request for the information discussed in Items (b) through (d) or why there is no official mention of the applicant having furnished this information.
- f. If the evidence mentioned above cannot be furnished, the petitioner requests the applicant's AAQA be repeated subject to the necessary information, data, and supporting analyses being formally requested by DEP and formally furnished to DEP.
- g. Based on the results of Item (f), the petitioner requests that DEP duplicate the results of the applicant's AAQA and formally publish the results of this duplication.

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Mo LANDERS & PARSONS L

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Oleander Power Project, L.P.
Mr. Richard L. Wolfinger, Vice President
250 West Pratt Street, 23 Floor
Baltimore, MD 21201

LANDERS & PARSONS, P.A.
ATTORNEYS AT LAW

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JOSEPH W. LANDERS, JR.
JOHN T. LAVIA, III
FRED A. MCCORNACK
PHILIP S. PARSONS
ROBERT SCHEFFEL WRIGHT

HOWELL L. FERGUSON
OF COUNSEL

VICTORIA J. TSCHINKEL
SENIOR CONSULTANT
NOT A MEMBER OF THE FLORIDA BAR

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TALLAHASSEE, FL 32301

TELEPHONE (850) 681-0311
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www.landersonparsons.com

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NUMBER OF PAGES (INCLUDING COVER PAGE): 5

DATE: August 26, 1999

TO: Kim Jober Fax No. 922-6979
Fax No. _____
Fax No. _____

FROM: Jay LaVia
Email: jlavia@landersandparsons.com
Telephone: (850)681-0311 Fax: (850)224-5595

MESSAGE:

Here's the exhibit list we discussed.

IF ANY PROBLEMS, PLEASE CALL Rhonda AT: (850) 681-0311

CONFIDENTIALITY NOTE

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS LEGALLY PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPY OF THIS TELECOPY IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS TELECOPY IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ADDRESS ABOVE VIA THE UNITED STATES POSTAL SERVICE. THANK YOU.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CLARENCE ROWE)	
)	
Petitioner,)	
)	
v.)	DOAH CASE NO. 99-2581
)	
OLEANDER POWER PROJECT, L.P. and)	
STATE OF FLORIDA DEPARTMENT OF)	
ENVIRONMENTAL PROTECTION,)	
)	
Respondents.)	
)	

OLEANDER POWER PROJECT'S EXHIBIT LIST

Respondent, Oleander Power Project, L.P. ("Oleander") will introduce one or more of the following exhibits into evidence at the final hearing in this case.

1. The "Air Permit Application and Prevention of Significant Deterioration Analysis for the Oleander Power Project, Brevard County, Florida" (the "Application") (dated November 1998).
2. A letter dated November 25, 1998, from the Florida Department of Environmental Protection ("DEP") acknowledging receipt of Oleander's Application.
3. A letter dated December 17, 1998, from DEP to Oleander requesting additional information concerning the Application.
4. A "Technical Review of PSD Application" dated December 18, 1998, from the United States Fish and Wildlife Service concerning Oleander's Application.
5. A letter dated December 22, 1998, from DEP to Oleander requesting additional information concerning the Application.

6. A letter dated February 1, 1999, from Golder Associates to DEP, plus the following attachments:
 - a. Attachment 1 - "Isopleths of Maximum Ground-level Pollutant Concentrations Due to the Oleander Power Project"
 - b. Attachment 2 - "Receptor Locations Used in Air Quality Impact Analysis"
 - c. Attachment 3 - "PSD Application Replacement Tables"
 - d. Attachment 4 - Correspondence from Florida Gas Transmission Company and Sonat Energy Services
7. A copy of the public notice published by DEP in the Florida Administrative Weekly on February 19, 1999, providing notice of a public meeting on March 3, 1999, concerning the Oleander Power Project.
8. A copy of the notice published by DEP in the Orlando Sentinel on February 23, 1999, providing notice of a public meeting on March 3, 1999, concerning the Oleander Power Project.
9. A letter dated February 25, 1999, from Golder Associates to DEP confirming that Oleander will limit fuel oil use at the Project to a maximum of 1000 hrs/year.
10. A letter dated March 17, 1999, from Golder Associates to DEP, plus an attachment labeled "PSD Application Replacement Pages, Text and Tables."
11. A transmittal letter dated March 26, 1999, from DEP, plus the following attachments: DEP's "Intent to Issue"; a draft Air Construction Permit; Technical Evaluation and Preliminary Determination; and DEP's draft Best Available Control Technology ("BACT") Determination.

12. An affidavit of publication of notice in Florida Today (April 8, 1999) of a "Public Notice of Intent to Issue Air Construction Permit", which includes a notice of a public meeting on May 13, 1999 concerning the Oleander Power Project.

13. A letter dated May 6, 1999, from Golder Associates to DEP responding to DEP's intent to issue and the United States Fish and Wildlife Service's Technical Review.

14. Resume of Kennard F. Kosky.

15. Resume of Robert C. McCann, Jr.

16. Resume of Richard A. Zwolak.

17. A copy of the notice of public hearing in Florida Today, dated February 28, 1999, providing notice of a public meeting on March 3, 1999, concerning the Oleander Power Project.

18. Resume of Michael P. Halpin

19. Resume of Al Linero

20. A table entitled "Summary of Maximum Pollutant Concentrations Predicted for the Proposed Oleander Power Project."

21. A table entitled "Summary of Maximum Pollutant Concentrations Predicted for the Proposed Oleander Power Project with Other Air Emission Sources."

22. A graph entitled "Comparison of Predicted SO₂ Impacts to Ambient Standards (Proposed Project Alone)." (comparing SO₂ impacts on the basis of concentration in ug/m³)

23. A graph entitled "Comparison of Predicted SO₂ Impacts to Ambient Standards (Proposed Project Alone)." (comparing SO₂ impacts on the basis of the percentage of the applicable ambient air quality standard and PSD Class II increment)

24. A graph entitled "Comparison of Predicted PM Impacts to Ambient Standards (Proposed Project Alone)." (comparing PM impacts on the basis of concentration in $\mu\text{g}/\text{m}^3$)
25. A graph entitled "Comparison of Predicted PM_{10} Impacts to Ambient Standards (Proposed Project Alone)." (comparing PM_{10} impacts on the basis of the percentage of the applicable ambient air quality standard and PSD Class II increment)
26. A graph entitled "Comparison of Predicted NO_2 Impacts to Ambient Standards (Proposed Project Alone)." (comparing NO_2 impacts on the basis of concentration in $\mu\text{g}/\text{m}^3$)
27. A graph entitled "Comparison of Predicted NO_2 Impacts to Ambient Standards (Proposed Project Alone)." (comparing NO_2 impacts on the basis of the percentage of the applicable ambient air quality standard and PSD Class II increment)
28. A table entitled "Emissions of the Oleander Power Project."
29. A table entitled "Emissions of the Oleander Power Project Compared to the Prevention of Significant Deterioration (PSD) Review Criteria."
30. A table entitled "Summary of Best Available Control Technology (BACT) Evaluation for the Oleander Power Project."
31. A composite exhibit containing copies of published notices of public workshops and neighborhood meetings held by Oleander to educate the public concerning the Oleander Power Project.
32. Rebuttal exhibits
33. Demonstrative exhibits



Department of Environmental Protection

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32309-3000

Jeb Bush
Governor

David Struhs
Secretary

FAX COVER SHEET

TO: Kim Jones

TELEPHONE NUMBER: _____

FAX NUMBER: _____

FROM: Heather

FAX NUMBER: 921-3000

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COMMENTS:

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CLARENCE ROWE,)	
)	
Petitioner,)	
)	
vs.)	Case No. 99-2581
)	
OLEANDER POWER PROJECT, L.P.,)	
and DEPARTMENT OF ENVIRONMENTAL)	
PROTECTION,)	
)	
Respondent.)	
)	

NOTICE OF HEARING

A hearing will be held in this case beginning on August 25, 1999, commencing at 9:30 a.m., or as soon thereafter as possible, at the Brevard County Government Center, Housing and Human Services, Building B, First Floor Conference Room, 2725 Judge Fran Jamison Way, Viera, Florida. Continuances will be granted only by order of the Administrative Law Judge for good cause shown.


ISSUES: As stated in the Petition For Administrative Hearing.

AUTHORITY: Section 230.23(4)(m), Florida Statutes; and Chapter 28-106, Parts I and II, Florida Administrative Code.

The parties shall arrange to have all witnesses and evidence present at the time and place of hearing. Arrangements for the court reporter will be made by the agency. Subpoenas will be issued by the Administrative Law Judge upon request of the parties. All parties have the right to present oral argument and to cross-examine opposing witnesses. All parties have the right

to be represented by counsel or other qualified representative, in accordance with Rule 28-106.106, Florida Administrative Code. As envisioned by Rule 28-106.211, Florida Administrative Code, failure to appear at this hearing may be grounds for entry of an order of dismissal or recommended order of dismissal, as appropriate.

July 27, 1999



DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
The Desoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

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418 Pennsylvania Avenue
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W. Douglas Beason
Assistant General Counsel
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

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P.02

Petition for Administrative Hearing

Petitioner:

Clarence Rowe
418 Pennsylvania Ave.
Rockledge, FL 32955
Telephone: (407) 636-8762

Applicant:

Oleander Power Project, L.P.
Mr. Richard L. Wolfinger, Vice President
250 West Pratt Street, 23rd Floor
Baltimore, MD 21201

Permit File Number: DEP File No. 0090180-001-AC (PSD-FL-258)

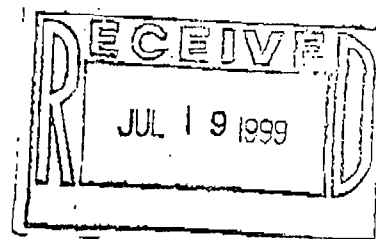
County in Which Project is Proposed: Brevard

Statement of how petitioner received notice:

An article in "Florida Today" newspaper, March 30, 1999

Statement of when petitioner received notice:

An article in "Florida Today" newspaper, March 30, 1999



Statements of how petitioner's substantial interests are affected by proposed action:

I, Clarence Rowe, the petitioner, believe that the health, well being, and quality of life of my family, grand children, and citizens of Brevard County will be significantly damaged by air emissions from the applicant's proposed project.

Statement of material facts disputed by the petitioner:

The petitioner disputes the findings of the Florida Department of Environmental Protection, herein referred to as DEP, that the applicant has demonstrated the proposed facility will not cause or contribute to, air pollution in excess of any: (a) maximum allowable increase or maximum allowable concentration for any pollutant stipulated in the Clean Air Act of the United States, (b) the national air quality standard that is applicable for the region of the proposed project, or any other applicable emission standard or standard of performance under the Clean Air Act of the United States.

Statement of the facts the petitioner contends warrants reversal or modification:

The petitioner believes the applicant's proposed facility falls within the definitions and regulations of Environmental Injustice because there are economically disadvantaged and minority communities within close proximity to the facility's site.

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The petitioner believes the DEP has not adequately evaluated the applicant's Ambient Air Quality Analysis (AAQA).

1-19-99 01:17P

Best Available Copy

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Statement of relief sought by the petitioner:

- a. The petitioner believes the permit for the applicant's proposed facility should be disallowed for reasons of Environmental Injustice. Brevard County already has two power plants and a boat fabrication facility within approximately eight miles of the proposed site. These three facilities are Title V emitters of air pollutants. Under the concept of Environmental Injustice, the applicant's proposed site is an area of concern. Brevard County already has too much pollution without adding the applicant's facility. Fortunately, NASA launch fallout is mostly offshore; however, FPL and OUC utilities lay down considerable visible plume that blows over land. The applicant's site location will deposit most of the fallout across residential neighborhoods and then into the St. Johns River or Indian River. During a and southwest wind flow, the applicant's plant and FPL plant will have overlapping plume patterns, thus increasing concentrations of fallout. Were there a compelling need in Brevard County for this plant, we could better understand the location; however, lacking a compelling need, this appears to be a crass commercial venture foisted upon a minority community and low-income populations, because they are without political muscle to prevent the act. Under the concept of Environmental Injustice you are requested to deny any permit for the proposed facility, or to request the appropriate governmental agency with proper jurisdiction and authority to determine the Environmental Justice issue. The petitioner requests a full investigation and hearing on the current air quality in the area of the proposed facility and along term projection of air quality in the area of the proposed facility prior to permitting any additional air pollutants.
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- d. The applicant's air permit application states that the applicant used estimated pollutant concentrations in performing his AAQA. The petitioner requests evidence that DEP requested and reviewed an analysis that supports the applicant's estimates.
- e. The petitioner requests DEP to explain why the official record as documented in the Intent to Issue an Air Permit shows no official request for the information discussed in Items (b) through (d) or why there is no official mention of the applicant having furnished this information.
- f. If the evidence mentioned above cannot be furnished, the petitioner requests the applicant's AAQA be repeated subject to the necessary information, data, and supporting analyses being formally requested by DEP and formally furnished to DEP.
- g. Based on the results of Item (f), the petitioner requests that DEP duplicate the results of the applicant's AAQA and formally publish the results of this duplication.

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P.05

Facsimile Transmission

Date: July 19, 1999

To: Mr. David S. Dee, Esq. FAX (850) 224-5595

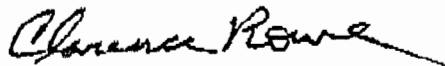
To: Mr. Daniel Manry FAX (850) 921-6847
Administrative Law Judge

From: Clarence Rowe

Subject: Submittal of Petition for Administrative Hearing

Number of Pages (Including Cover Page): 4

Signed:



Clarence Rowe
Petitioner

Petition for Administrative Hearing

Petitioner:

Clarence Rowe
418 Pennsylvania Ave.
Rockledge, FL 32955
Telephone: (407) 636-8762

Applicant:

Oleander Power Project, L.P.
Mr. Richard L. Wolfinger, Vice President
250 West Pratt Street, 23rd Floor
Baltimore, MD 21201

Permit File Number: DEP File No. 0090180-001-AC (PSD-FL-258)

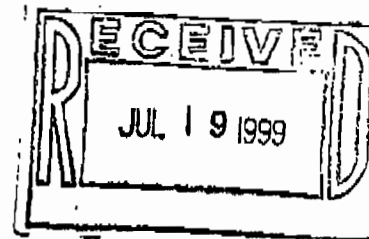
County in Which Project is Proposed: Brevard

Statement of how petitioner received notice:

An article in "Florida Today" newspaper, March 30, 1999

Statement of when petitioner received notice:

An article in "Florida Today" newspaper, March 30, 1999



Statements of how petitioner's substantial interests are affected by proposed action:

I, Clarence Rowe, the petitioner, believe that the health, well being, and quality of life of my family, grand children, and citizens of Brevard County will be significantly damaged by air emissions from the applicant's proposed project.

Statement of material facts disputed by the petitioner:

The petitioner disputes the findings of the Florida Department of Environmental Protection, herein referred to as DEP, that the applicant has demonstrated the proposed facility will not cause or contribute to, air pollution in excess of any: (a) maximum allowable increase or maximum allowable concentration for any pollutant stipulated in the Clean Air Act of the United States, (b) the national air quality standard that is applicable for the region of the proposed project, or any other applicable emission standard or standard of performance under the Clean Air Act of the United States.

Statement of the facts the petitioner contends warrants reversal or modification:

The petitioner believes the applicant's proposed facility falls within the definitions and regulations of Environmental Injustice because there are economically disadvantaged and minority communities within close proximity to the facility's site.

The petitioner believes the applicant has not adequately demonstrated or proven that the proposed project will not adversely impact or exceed air quality standards set forth in the Clean Air Act of the United States.

The petitioner believes the DEP has not adequately evaluated the applicant's Ambient Air Quality Analysis (AAQA).

The petitioner believes the DEP has not adequately evaluated the applicant's Ambient Air Quality Analysis (AAQA).

Statement of the rules or statutes that the petitioner contends requires a reversal or modification or the DEP actions:

The petitioner believes the DEP has not followed the letter or spirit of the Clean Air Act of the United States, Title I, Part C, Section 165, Subsection 3 which states: "the owner or operator of such facility demonstrates, as required pursuant to section 110(G), that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this Act;"

Statement of relief sought by the petitioner:

- a. The petitioner believes the permit for the applicant's proposed facility should be disallowed for reasons of Environmental Injustice. Brevard County already has two power plants and a boat fabrication facility within approximately eight miles of the proposed site. These three facilities are Title V emitters of air pollutants. Under the concept of Environmental Injustice, the applicant's proposed site is an area of concern. Brevard County already has too much pollution without adding the applicant's facility. Fortunately, NASA launch fallout is mostly offshore; however, FPL and OUC utilities lay down considerable visible plume that blows over land. The applicant's site location will deposit most of the fallout across residential neighborhoods and then into the St. Johns River or Indian River. During a and southwest wind flow, the applicant's plant and FPL plant will have overlapping plume patterns, thus increasing concentrations of fallout. Were there a compelling need in Brevard County for this plant, we could better understand the location; however, lacking a compelling need, this appears to be a crass commercial venture foisted upon a minority community and low-income populations, because they are without political muscle to prevent the act. Under the concept of Environmental Injustice you are requested to deny any permit for the proposed facility, or to request the appropriate governmental agency with proper jurisdiction and authority to determine the Environmental Justice issue. The petitioner requests a full investigation and hearing on the current air quality in the area of the proposed facility and along term projection of air quality in the area of the proposed facility prior to permitting any additional air polluters.
- b. The petitioner requests evidence that the DEP requested sufficient data from the applicant to duplicate the applicant's AAQA.
- c. The petitioner requests evidence that the DEP duplicated the applicant's AAQA.
- d. The applicant's air permit application states that the applicant used estimated pollutant concentrations in performing his AAQA. The petitioner requests evidence that DEP requested and reviewed an analysis that supports the applicant's estimates.
- e. The petitioner requests DEP to explain why the official record as documented in the Intent to Issue an Air Permit shows no official request for the information discussed in Items (b) through (d) or why there is no official mention of the applicant having furnished this information.
- f. If the evidence mentioned above cannot be furnished, the petitioner requests the applicant's AAQA be repeated subject to the necessary information, data, and supporting analyses being formally requested by DEP and formally furnished to DEP.
- g. Based on the results of Item (f), the petitioner requests that DEP duplicate the results of the applicant's AAQA and formally publish the results of this duplication.

COPIES FURNISHED:

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