SIERRA CLUB’S EXCEPTIONS TO RECOMMENDED ORDER

As authorized by section 120.57(1)(k), Florida Statutes (“Fla. Stat.”)\(^1\), and Florida Administrative Code Rule 28-106.217, Sierra Club files these exceptions to the Recommended Order entered by Administrative Law Judge Sellers (the “Judge”) on July 30, 2018 (“RO”).\(^2\)

INTRODUCTION

This case concerns Florida Power & Light’s (“FPL”) destructive approach to generating energy by burning fossil fuel—an approach that will leave Southeast Florida literally underwater. FPL wants to build another fossil fuel-burning power plant in Dania Beach (called “Unit 7” or “DBEC”), on the theory that it may be slightly less destructive than FPL’s other plants. But the law rejects such complacency; instead, “the state shall ensure through available and reasonable methods that the location and operation of electrical power plants will produce minimal adverse effects on human health, the environment, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life.” § 403.502, Fla. Stat. (emphasis added).

Minimal adverse effects is the legal standard for good reason: as Judge Sellers found, power plants that burn fossil fuel cause climate change both globally and locally in Southeast Florida. RO ¶¶ 173-93. More specifically, “competent, persuasive evidence establishes that climate change is occurring, that it is primarily caused by [greenhouse gas (“GHG”) emissions,

\(^1\) All references to the Florida Statutes are to the 2018 edition, unless otherwise noted.

\(^2\) The first two sections introduce relevant background and a summary of the exceptions, without limiting the exceptions below in any way.
and that every ton of GHGs emitted into the atmosphere contributes to climate change.” RO ¶ 192. And Judge Sellers correctly found that the cumulative problem of climate change is only getting worse:

- “Increasing the concentration of carbon dioxide in the atmosphere increases the rate of climate change, which, in turn, accelerates sea level rise.” RO ¶ 181.
- “Sea level rise causes substantial coastal hazards, including inundation of land, higher storm surges, higher king tides, increased flood height and frequency, coastal erosion and destruction of coastal mangroves and other ecosystems, erosion and destruction of coastal barrier islands, and saltwater intrusion into freshwater aquifers and ecosystems. These impacts will worsen or accelerate with sea level rise.” RO ¶ 187.
- “Due to its low elevation, [S]outheast Florida is particularly vulnerable to sea level rise.” RO ¶ 185.

Moreover, the record shows that global mean temperatures will rise to fatally high levels by the end of the century under a “fossil fuel-intensive, ‘business-as-usual’ emission scenario.” SC-84, Maul Depo. Ex. 4, NOAA, Global & Regional Sea Level Rise Scenarios for the U.S. 11 (2017). But even by mid-century, the average Southeast Florida resident will experience up to 53 extremely hot days, with temperatures above 95 degrees, causing thousands of heat-related deaths. SC-7, Risky Business Project, Risky Business Climate Assessment 4-5 (2014).

To manage the threat of catastrophic climate losses, deep GHG emission reductions are

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3 Carbon dioxide and methane are GHGs, and are among the “most significant contributors” to climate change. RO ¶ 175. Unit 7 will emit both carbon dioxide and methane. RO ¶ 50. Unless otherwise noted, “carbon dioxide,” “methane,” and “GHGs” are used interchangeably herein.

4 “Climate losses” or “climate damages” refer to the wide-ranging damages from climate change to human health, the economy, and the natural and built environments.
necessary. Such reductions are feasible, as the Legislature found that “the impacts of global climate change *can be reduced* through the reduction of greenhouse gas emissions.” § 377.601(1), Fla. Stat. (emphasis added); see also SC-7, Risky Business Project, *Risky Business Climate Assessment* 3 (2014) (“[I]f we act aggressively to both adapt to the changing climate and to mitigate future impacts by reducing carbon emissions—we can significantly reduce our exposure to the worst economic risks from climate change . . . .”). Thus, the Legislature mandated that “Florida . . . shall reduce atmospheric carbon dioxide by promoting an increased use of renewable energy resources and low-carbon-emitting electric power plants.” § 187.201(11)(a), Fla. Stat. So, too, in reviewing proposed power plants, Florida “shall ensure” that these plants “produce minimal adverse effects.” § 403.502, Fla. Stat.

Yet the record shows that FPL’s proposed Unit 7 would lead to a significant net increase in FPL’s GHG emissions and exacerbate Florida’s climate losses. See Sierra Club’s Proposed Recommended Order (“SC PRO”) FOF ¶¶ 12-28. By a very conservative estimate, Unit 7’s share of losses will cost *three times more* than Unit 7’s alleged benefits, RO ¶¶ 93-94, and that cost will be *hundreds of millions of dollars*. Compare RO ¶ 93 (“[D]amages [in Florida] resulting from DBEC’s annual carbon dioxide emissions would range from $8.4 million and $27 million per year.”), with id. ¶ 121 (“DBEC has a design life of 40 years.”). See also RO ¶ 91 (finding that, by another conservative estimate, “damages due to carbon dioxide emitted by DBEC would range from $213 million to $289 million on an annual basis”).

To make matters even worse, rising seas can inundate the proposed site of Unit 7 and the communities in Southeast Florida—all within Unit 7’s 40-year life. SC PRO FOF ¶¶ 9, 89-98. In fact, the proposed site and the adjacent neighborhood are only two to three feet above sea level,

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5 The abbreviations “FOF” and “COL” refer to the Findings of Fact and Conclusions of Law sections within Sierra Club’s Proposed Recommended Order.
so they will be the first to flood. SC PRO FOF ¶ 9. This flooding will leave the neighborhood, access roads, and associated facilities—all necessary for Unit 7’s operation—literally underwater, SC PRO FOF ¶¶ 89-98, 140-44, because FPL will not raise them, against the advice of its own experts, SC PRO FOF ¶ 144. As a result, Unit 7 will become inaccessible and inoperable at best. But the Judge recommends ignoring this fact merely because the existing structures complied with regulation and code “at the time they were approved.” RO ¶ 127. Such ignorance is contrary to the Siting Act and fails the people of Southeast Florida.

The exceptions below go to the instances where, instead of the minimal-adverse-effects standard in the Siting Act, the Judge accepted FPL’s self-made standard apparently satisfied by Unit 7 being allegedly, slightly less destructive than FPL’s other existing plants. But FPL’s standard has no basis in law. Nor did FPL make the showing required by the actual standard, that FPL will use reasonable and available methods to minimize Unit 7’s adverse effects. § 403.502, Fla. Stat. To the contrary, FPL never even examined adopting meaningful amounts of alternate energy technologies such as solar to minimize Unit 7’s adverse effects, despite the evidence that those effects will be massive. See, e.g., RO ¶¶ 91, 93-94. Thus, under FPL’s complacent approach, Unit 7 will exacerbate the climate losses from FPL’s other fossil fuel-burning power plants and leave Southeast Florida literally underwater.

Now, the Governor and Cabinet, sitting as the Siting Board (the “Board”), must apply the correct legal standard. They should either deny the certification of Unit 7; condition certification on the common sense measures proposed by Sierra Club to reduce Unit 7’s massive adverse effects; or remand this matter for the Judge to take evidence on measures such as solar additions that undisputedly can significantly decrease the GHG emissions from fossil fuel-burning power

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6 As explained in the exceptions, below, FPL only examined such technologies for the limited purpose of mitigating the need for Unit 7, not for minimizing Unit 7’s adverse effects.
plants like Unit 7, but that no one below examined for the purpose of minimizing Unit 7’s adverse effects.

THE GOVERNOR AND CABINET HAVE THE DUTY TO PROTECT THE PUBLIC, AND TO APPLY THE MINIMAL-ADVERSE-EFFECTS STANDARD.

Under the Florida Electrical Power Plant Siting Act (“Siting Act”), sections 403.501 through 403.518, Fla. Stat., the Governor and Cabinet, sitting as the Siting Board, have the duty to protect the broad interests of the public as they decide whether, and on what conditions, FPL may proceed to locate and operate Unit 7 in Dania Beach. See §§ 403.502, 403.509(3), Fla. Stat. In making this decision, the Board “shall consider whether, and the extent to which, the location, construction, and operation of the electrical power plant will [among other things] [m]inimize, through the use of reasonable and available methods, the adverse effects on human health, the environment, and the ecology of the land and its wildlife and the ecology of state waters and their aquatic life.”\(^7\) § 403.509(3)(f), Fla. Stat. The plain meaning of “minimize,” is to “reduce to the smallest possible degree.”\(^8\) Minimize, Cambridge English Dictionary Online (2018). As applied here, the Siting Board must consider whether and the extent to which Unit 7’s location, construction, and operation will use reasonable and available methods to reduce to the smallest possible degree Unit 7’s adverse effects.

This requirement to minimize harm to the human health, the environment, and the ecology across the state was established by the Legislature to protect “the broad interests of the public” from the “significant impact” of siting additional power plants in Florida. § 403.502, Fla.

\(^7\) The discussion here focuses on the minimal-adverse-effects standard because it is critical to the proper disposition of this case. However, as discussed in the exceptions below, additional standards in the Siting Act and other statutes support the exceptions and the relief proposed by Sierra Club. Accordingly, this discussion in no way limits the exceptions below.

\(^8\) In the absence of a statutory definition, the plain meaning of a statutory term “can be ascertained by reference to a dictionary . . . .” Crist v. Jaber, 908 So. 2d 426, 432 (Fla. 2005).
Stat. No agency is charged with enforcing the minimal-adverse-effects standard in any predicate permits; the standard applies to the final, administrative disposition of this case. § 403.509, Fla. Stat. (titled “Final disposition of application”); see also SC PRO FOF ¶¶ 227-243 (discussing the limited scope of the predicate permits for Unit 7). Yet the Judge wrongly accepted FPL’s claim that the predicate permits are determinative in this case, and that the Board lacks jurisdiction to inquire into alternate energy technologies that can significantly decrease the GHG emissions from fossil fuel-burning power plants like Unit 7. FDEP-6 at 002517. This is flatly wrong. The Board has broad powers to impose conditions on a proposed power plant or to deny the plant. See § 403.511(2)(b)1, Fla. Stat. (“[C]ertification may include conditions which constitute variances, exemptions, or exceptions from nonprocedural requirements of the department or any agency which were expressly considered during the proceeding.”); § 403.509(1)(b), Fla. Stat. (“[T]he [B]oard shall act . . . by written order, approving or denying certification, in accordance with the terms of [the Siting Act], and stating the reasons for issuance or denial.”); see also AES Cedar Bay, Inc. v. Dep’t of Envtl. Regulation, Case No. 88-5740 at ¶ 88 (Fla. DOAH Apr. 14, 1989) (“In the executive branch, the Siting Board has final say on all environmental aspects of . . . building and operating an electrical generating plant . . . [including] the choice of fuel.”); cf. Miami-Dade Cty. v. Fla. Power & Light Co., 208 So. 3d 111, 119 (Fla. 3rd DCA 2016) (reversing Siting Board’s conclusion that it lacked authority to condition approval of transmission line on measure to reduce adverse effects), petition for review denied sub nom. In re Fla. Power & Light Co. v. Miami–Dade Cty., No. SC16-2277, 2017 WL 727759 (Fla. Feb. 24, 2017).9

9 Mitigating climate losses through the promotion of alternate energy technologies is also the policy mandate of all agencies. See, e.g., § 187.201(11)(a), Fla. Stat. (state energy policy); § 377.601, Fla. Stat. (policy to reduce GHG emissions); cf. § 366.91(1), Fla. Stat. (“The Legislature finds that it is in the public interest to promote the development of renewable energy resources in this state. Renewable energy resources have the potential to . . . improve environmental conditions . . . “).
Here, neither the Public Service Commission (“Commission” or “PSC”) nor the Department of Environmental Protection (“Department” or “DEP”) considered whether there are reasonable and available methods to minimize Unit 7’s adverse effects, or, specifically, whether alternate energy technologies such as solar could be used to do so. See SC PRO FOF ¶¶ 203-224 (citing related admissions by FPL and DEP). Rather, as required by section 403.519, the PSC considered alternate energy technologies such as solar for the limited purpose of whether they can cost-effectively mitigate the need for Unit 7. See In re: Petition for determination of need for Dania Beach Clean Energy Center Unit 7, by FPL, Order No. PSC-2018-0150-FOF-EI in Docket No. 20170225-EI at 8 (March 19, 2018) (“PSC Need Determination”). As for Unit 7’s adverse effects on the human health, the environment, and the ecology across Florida, the PSC has neither the expertise nor the jurisdiction to inquire into these effects, much less to resolve whether alternate energy technologies are reasonable and available to minimize them. See In re: Petition of FPL to determine need for electrical power plant - Lauderdale repowering, Order No. 23079 in Docket No. 19890973-EI at 19 (June 15, 1990) (“The Commission does not have statutory jurisdiction over the environment or natural resources in the State of Florida . . . . [T]he evaluation of the environmental impacts of this or any future proposed plants . . . are simply not within the jurisdiction of this body and therefore, not properly considered in the need determination at issue here.”). Thus, unsurprisingly, the PSC’s need determination only resolved the need for Unit 7, not its permissible environmental impacts.

DEP likewise did not resolve Unit 7’s permissible environmental impacts. Although DEP made a “best available control technology” or “BACT” determination for Unit 7, that determination is no substitute for the Board’s minimal-adverse-effects determination, because the latter is different from, and more protective than DEP’s BACT determination. In particular,
DEP considered a limited subset of technologies, which could be directly installed onto Unit 7 (“bolt-on controls”), and DEP further limited that subset to exclude solar:

The integration of steam derived from solar energy can significantly decrease the GHG emissions from a [fossil fuel-fired] power plant per unit of electricity produced. However, to consider such technologies when evaluating BACT for a fossil fuel-fired plant would constitute as [sic] a fundamental redefinition of the project. Therefore, these hybrid technologies were not considered when determining BACT for Unit 7.

FDEP-6 at 002515-18 (emphasis added). Plainly, when DEP ruled out solar, DEP acknowledged that solar could “significantly decrease” GHG emissions, but DEP concluded that solar was not within the purview of the air permit. Upon examination by Sierra Club, DEP’s head of air permitting Mr. Arif reiterated that solar and other alternate energy technologies that reduce emissions and their adverse environment impacts were simply not part of DEP’s inquiry. See Arif, SC-85 T.67:5-10 (“[W]hat effect does it [Unit 7’s GHG emissions] have on the environment outside the facility boundary, that wasn’t looked at.”). This fact is undisputed, as FPL’s consultant for air permitting also readily admitted: “No, that’s a—that is under an entirely different regulation . . . .” See Kosky, SC-80 T.136:18-24 (responding to the question of “whether the project will minimize the adverse effects, environmental effects through reasonable and available methods”).

In sum, it is for the Siting Board, not the PSC or DEP, to decide what are reasonable and available methods to minimize Unit 7’s adverse effects and, specifically, how much alternate energy technologies such as solar FPL must use to do so. See AES Cedar Bay, Inc. v. Dep’t of Envtl. Regulation, Case No. 88-5740 at ¶ 96 (“[T]he ‘minimal adverse effects’ standard undoubtedly requires that certain effects be kept below what might be permitted in other contexts.”). But the Judge misunderstood this critical legal issue. Although no predicate permits
ever even considered the use of alternate energy technologies such as solar to minimize Unit 7’s adverse effects, at FPL’s urging, the Judge wrongly barred Sierra Club from introducing evidence on this issue at the site certification hearing. See Order Granting Petition to Intervene and Limiting Issues to be Addressed in the Certification Hearing, Case No. 17-4388EPP at 1 (Fla. DOAH May 4, 2018) (“May 4 Order”); see also Sierra Club’s Reply to FPL’s Response in Opposition to Sierra Club’s Intervention Petition, Apr. 4, 2018 (explaining that the Board has an independent duty to consider alternate energy technologies).

Because the Judge erred as a matter of law by barring crucial evidence, and because the record shows that the adverse effects of Unit 7 are massive, the Board should either deny the certification of Unit 7; condition certification as proposed by Sierra Club; or else remand this matter for the Judge to take evidence on alternate energy technologies such as solar that no one below ever examined for the purpose of minimizing Unit 7’s massive adverse effects.

STANDARD OF REVIEW

The Siting Boards has the “ultimate” responsibility under the Siting Act to “administratively . . . interpret[] the statutory provisions consistent with the [L]egislature’s intent and objectives.” Pub. Emps. Relations Comm’n v. Dade Cty. Police Benevolent Ass’n., 467 So. 2d 987, 989 (Fla. 1985) (emphasis in original). Section 120.57(1)(l), Fla. Stat., provides that an agency, such as the Siting Board, reviewing a recommended order “may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction,” provided that the Board’s reasons are stated

10 The Board derives statewide jurisdiction over power plant site certification from the Siting Act, section 403.509(3), Fla. Stat., and is therefore an agency. See § 120.52(1), Fla. Stat. (defining an “agency” as “officers or governmental entities if acting pursuant to powers other than those derived from the constitution” including “[t]he Governor” and “[e]ach officer and governmental entity in the state having statewide jurisdiction”).
with particularity and the Board “make[s] a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.”

In addition, the Board may reject or modify findings of fact if the Board “first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.” Id.

Competent, substantial evidence must be reasonable and logical. Wiggins v. Fla. Dep’t of Highway Safety & Motor Vehicles, 209 So. 3d 1165, 1173 (Fla. 2017) (citation omitted); see also DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957) (defining competent evidence as “sufficiently relevant and material” and substantial evidence as “establish[ing] a substantial basis of fact from which the fact at issue can be reasonably inferred”). Speculation and conjecture are not competent, substantial evidence. See Callwood v. Callwood, 221 So. 3d 1198, 1202 (Fla. 4th DCA 2017) (citation omitted). A prediction is speculative if it is subject to assumptions or changing circumstances, unless the prediction can be established with reasonable certainty. See Regions Bank v. Maroone Chevrolet, L.L.C., 118 So. 3d 251, 257 (Fla. 3d DCA 2013); Devon Med., Inc. v. Ryvmed Med., Inc., 60 So. 3d 1125, 1128-29 (Fla. 4th DCA 2011); Roberts v. Roberts, 689 So. 2d 378, 380-82 (Fla. 4th DCA 1997).

The Judge’s findings must comply with the “essential requirements of law,” or the procedural aspects of the administrative hearing process. See § 120.57(1)(l), Fla. Stat.; cf. Dep’t of Health & Rehab. Servs. v. Yhap, 680 So. 2d 559, 560 (Fla. 1st DCA 1996). The appropriate remedy for a judge’s failure to comply with the essential requirements of law—for example, to make findings on contested claims necessary for the agency’s issuance of a final order—is
remand. See State v. Murciano, 163 So. 3d 662, 665 (Fla. 1st DCA 2015); Cohn v. Dep’t of Prof. Regulation, 477 So. 2d 1039, 1047 (Fla. 3d DCA 1985).

Special considerations arise when the matter under review is infused with policy considerations. See McDonald v. Dep’t of Banking and Fin., 346 So.2d 569, 584 (Fla. 1st DCA 1977) (hearing officer’s policy-infused factual findings were accorded comparatively little weight relative to the agency’s substitute findings); Hammond v. Dep’t of Transp., 493 So.2d 33, 35 (Fla. 1st DCA 1986) (citations omitted) (hearing officer’s findings were entitled to less deference insofar as they addressed issues which are not susceptible of ordinary proof or which are dependent upon matters of opinion infused with policy considerations within the ambit of the agency’s expertise); Baptist Hospital, Inc. v. State, Dep’t of Health & Rehabilitative Servs., 500 So.2d 620, 623 (Fla. 1st DCA 1986) (citations omitted) (“[M]atters infused with overriding policy considerations are left to agency discretion.”); cf. Peoples Bank of Indian River Cty. v. State, Dep’t of Banking & Fin., 395 So.2d 521, 524 (Fla. 1981) (explaining that an agency is accorded wide discretion in determining whether statutory criteria which involved policy considerations within the special expertise of the agency were satisfied); Heifetz v. Dep’t of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) (stating that a hearing officer is not charged with policy considerations). Here, because the Siting Act charges the Siting Board with policy considerations involving the broad interests of the public, the Board is ultimately responsible for applying the statute consistent with the same.
EXCEPTIONS

1. **Paragraph 15 and Note 8**¹¹

   Paragraph 15 begins with the finding that Unit 7 would be primarily gas-fueled, but then wrongly concludes that the fuel pipeline to Unit 7 “is not part of this site certification proceeding.” This conclusion must be rejected as a matter of law. Unit 7 is a legally relevant cause for the continued (and expanded) use of the pipeline, because the Board could—and should—reject Unit 7 on the grounds that it is too harmful to the environment. Under this scenario, the pipeline’s use and the related adverse effects would decrease: Units 4 and 5¹² are currently supplied by that pipeline and they are scheduled to retire in 2018, SC PRO FOF ¶ 23. Conversely, if the Board were to approve Unit 7 and it were built, both the pipeline’s use and the related adverse effects would increase. Either way, ignoring the pipeline’s adverse effects, as the Judge recommends, is contrary to the minimal-adverse-effects standard, which requires consideration of Unit 7’s adverse effects and, thus, those of its fuel pipeline, as they are reasonably foreseeable and traceable to the plant’s “location, construction, and operation.” § 403.509(3), Fla. Stat.; see also Conservancy, Inc. v. A. Vernon Allen Builder, Inc., 580 So. 2d 772, 778 (Fla. 1st. DCA 1991) (explaining that environmental impact analysis includes consideration “the cumulative impacts of similar projects which are existing, under construction, or reasonably expected in the future”).

   The Judge wrongly interpreted the statutory definition and relevance of the term “electrical power plant.” See RO n. 8. The definition provides that, “[a]t the applicant’s option,

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¹¹ The exceptions refer to paragraphs in the Recommended Order, unless otherwise noted.

¹² Like Unit 7, these “are also [fossil fuel-burning] units but use older, less efficient equipment.” RO ¶ 14. The record also refers to them as “existing units” and “Lauderdale 4 and 5 Units,” as they are at the “Lauderdale Site,” which is where FPL proposes to locate Unit 7.
the term may include any offsite associated facilities that will not be owned by the applicant.”

Here, FPL opted to include the pipeline in its application for a license for Unit 7, see, e.g., FDEP-1b at 000025, 000033, and FPL urged the Board to consider the pipeline as an “environmental benefit,” see FPL Proposed Recommended Order (“FPL PRO”) ¶ 50. The pipeline is thus well within the ambit of this proceeding.

Moreover, the Judge’s reasoning leads to absurd results: if the Judge were correct, then the Board could not consider the interests of the public, because they are not part of the definition of an electrical power plant. But the Siting Act expressly provides that the Board “shall consider whether, and the extent to which, the location, construction, and operation of the electrical power plant will . . . [s]erve and protect the broad interests of the public.” § 403.509(3)(g), Fla. Stat. The Judge clearly erred.

Accordingly, Note 8 of the Recommended Order must be rejected in its entirety and the erroneous legal conclusion must be struck from Paragraph 15, as follows:

15. As noted above, Unit 7 will use natural gas as its primary fuel. The natural gas will be delivered to the DBEC site through an existing natural gas pipeline, which originates offsite and is not part of this site certification proceeding. Ultra-low sulfur distillate (“ULSD”) oil will be used as the back-up fuel.

2. **Paragraphs 17 through 24**

The “findings” in Paragraphs 17 through 24 flow from the false premise that FPL’s projections of a slight decrease in the destructiveness of FPL’s system from replacing Units 4 and 5 with Unit 7 are germane to the resolution of this case and specifically to the minimal-adverse-effects standard. For the reasons below, the premise and the findings should be rejected because they are contrary to law, are not supported by competent, substantial evidence, and amount to unsound policy recommendations that are due no deference.
The premise is contrary to law because FPL’s projections do not even attempt to show that Unit 7’s adverse effects will be minimized or reduced to the smallest possible degree. The projections focus instead on the adverse effects of FPL’s system. Through these projections, FPL attempts to show that replacing Units 4 and 5 with Unit 7 would make FPL’s system slightly less destructive. See SC PRO FOF 54, 261 (explaining that FPL’s projections reflect only a 0.66% decrease in FPL’s system GHG emissions). FPL does not even attempt to show that Unit 7 is the least destructive power plant on FPL’s system. Nor does FPL attempt to show that Unit 7 will reduce the adverse effects of FPL’s system to a minimum. § 403.509(3)(f), Fla. Stat.; see also RO ¶ 198 (noting “expertise” of “affected agencies” listed in section 403.507, Fla. Stat., such as the PSC). Such showings are impossible to make through FPL’s projections, as FPL refused to consider any meaningful expansion of alternate energy technologies such as solar, which emit no GHGs and reduce the GHG emissions of fossil fuel-burning power plants. See SC PRO FOF ¶¶ 251-57. FPL’s projections are thus contrary to the minimal-adverse-effects standard.\textsuperscript{13} See § 403.509(3)(f), Fla. Stat.

In fact, FPL’s projections consist of a comparison between just two scenarios: “one in which Units 4 and 5 continue to operate indefinitely and Unit 7 is not constructed and operated [i.e., “the indefinite operation scenario”]; and one in which Units 4 and 5 are retired in the fourth quarter of 2018, and Unit 7 is constructed and commences operation in mid-2022 [i.e., FPL’s proposal under review].” RO ¶ 18. But the PSC found the continued operation of Units 4 and 5 “uneconomic,” id. at 16, and accepted “FPL’s decision” to retire them in 2018. Id. at 7. And as the Judge correctly noted, RO ¶ 315, but then inexplicably ignored, the PSC’s finding is an “irrebuttable fact.” In re: Gainesville Renewable Energy Ctr., LLC, Case No. 09-6641 (Fla.

\textsuperscript{13} For further discussion of FPL’s limited consideration of solar, see Exceptions 4, 6, 7, 17, 18, 19, and 25.
DOAH Nov. 1, 2010), modified in part, Case No. 09-4002 (Fla. Siting Bd. Dec. 15, 2010) at 15 (citing Hamilton Cnty. Bd. of Cnty. Comm’r., 587 So. 2d at 1388-89 (Fla. 1st DCA 1991)). Notwithstanding FPL’s claims to the contrary, the Judge cannot arbitrarily reopen the PSC’s need determination and rest her findings on something that the PSC expressly rejected. Id.

It is also contrary to statutory policy to accept the above premise and findings. Doing so essentially rewards companies that choose to own and operate destructive fossil fuel-burning power plants and seek to construct new destructive, dirty power plants if the news plants are allegedly slightly less destructive than the existing plants. This would upend the protections afforded to the public by the minimal-adverse-effects standard.\(^{14}\) And the Board, as the agency implementing this statutory standard, has “the principal responsibility of interpreting the statutory provisions consistent with the [L]egislature’s intent and objectives,” Pub. Emps. Relations Comm’n, 467 So. 2d at 989, and it is for the Board, not the Judge, to decide what meets this standard that is so infused with policy considerations. See, e.g., McDonald, 346 So. 2d at 584; Hammond v. Dep’t of Transp., 493 So. 2d at 35.

For the foregoing reasons, Paragraphs 17 to 23 of the Recommended Order must be rejected in their entirety.

3. **Paragraph 24**

Although the Judge ruled that the fuel pipeline to Unit 7 is beyond the scope of this proceeding, RO ¶ 15, she inexplicably nonetheless went on to find that Unit 7 will reduce the amount of gas to be “transported by pipeline” to FPL’s system, RO ¶ 24. The ruling is wrong as a matter of law and must be rejected for the reasons discussed in Exception 1. The finding also

\(^{14}\) As noted, mitigating climate losses through the promotion of alternate energy technologies is the policy mandate of all agencies, which includes the Board. See, e.g., § 187.201(11)(a), Fla. Stat. (state energy policy); § 377.601, Fla. Stat. (policy to reduce GHG emissions).
must be rejected because it stems from the unlawful and unsupported comparison of Unit 7 to the indefinite operation scenario, discussed in Exception 2.

Paragraph 24 of the Recommended Order must be modified as follows:

24. Dr. Sim acknowledged that the social costs of carbon were not considered as part of the modeling of FPL’s system-wide projected natural gas consumption. **However, he noted that as a practical matter, because Unit 7 will operate more efficiently, FPL will demand less natural gas on a system-wide basis to fuel its electrical power generating units. As a result of reduced demand, less natural gas will need to be produced and transported by pipeline to fuel FPL’s electrical power plant generating system.**

4. **Paragraphs 27, 28, 31, and 32**

   Regarding the PSC’s consideration of alternate energy technologies, the Judge reached erroneous legal conclusions, mislabeled as findings of fact. See Battaglia Props., Ltd. v. Fla. Land and Water Adjudicatory Comm’n, 629 So. 2d 161, 168 (Fla. 5th DCA 1993) (citation omitted) (explaining that legal conclusions should be treated as such, regardless of their label). As noted above, the PSC considered alternate energy technologies for just one purpose: whether such technologies “taken by, or reasonably available to, [FPL] might mitigate the need for the proposed plant.” PSC Need Determination at 17. But Paragraphs 27, 28, 31, and 32 of the Recommended Order describe the PSC’s consideration without the critical qualification in the PSC’s order, which adheres to the qualification in the PSC’s standard under section 403.519(3), Fla. Stat. (“The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant . . .”). The omission is wrong as a matter of law. The PSC did not consider the use of alternate energy technologies beyond their role in mitigating a need for the plant; such analysis is not authorized by section 403.519(3).
Paragraphs 27, 28, 31, and 32 must be modified as follows:

27. During the need determination proceeding, Sierra contended, and presented evidence in an effort to show, that renewal [sic] energy sources and technologies, such as solar facilities, could be deployed incrementally to delay or potentially entirely forestall the need for Unit 7. Thus, as part of the need analysis, the PSC specifically considered the feasibility of using renewable generation options and sources, including solar facilities, to **mitigate the need for the proposed plant**.

28. The PSC specifically determined that, to **mitigate the need for the proposed plant**, the use of such generation options and sources, including solar facilities, was less cost-effective than DBEC. The PSC found that: “[n]o additional cost-effective renewable resource has been identified in this proceeding that can mitigate the need for new generation. Similarly, no additional cost-effective [Demand Side Management] has been identified in this proceeding that can mitigate the need for new generation.”

31. Pursuant to this statute, the PSC is the only entity authorized to determine whether an electrical power plant is needed, and whether, given the need for the power plant, the applicant should be required to implement renewable energy sources and technologies, including the use of solar generation facilities to **mitigate the need for the proposed plant**.

32. Here, the PSC determined that DBEC is needed, and further determined that the use of renewable energy sources and technologies, such as solar technology, was not cost-effective, and, therefore, was not reasonably available to **mitigate the need for the proposed plant**.

5. **Paragraph 33**

Paragraph 33 is another mislabeled, erroneous legal conclusion that should be rejected. In this paragraph, the Judge adopted the statutory interpretation favored by FPL, that the PSC’s consideration of alternate energy technologies to mitigate the need for Unit 7 under section 403.519(3), somehow precludes consideration of such technologies to minimize the adverse effects of Unit 7 under section 403.509(3). But as noted above, this conclusion is contrary to both plain statutory language and caselaw, so Paragraph 33 must be rejected in its entirety.
6. Paragraph 46

A lower emission rate should not be confused with a net emission decrease. The air permit regulates emission rates (the amount of air pollution per unit of energy generated) from the power plant stack. Arif, SC-85 T.32:1 to 33:12, T.31:14-25, T.37:1-13; FDEP-3 at 001785. It does not regulate the total emissions or the resulting adverse environmental impacts. The head of DEP’s air permit program, Mr. Arif, admitted as much: “in processing this air construction permit the impact was looked at what is coming out of the stack. The end point impacts were not considered because that is not required based on the [U.S. Environmental Protection Agency’s (“EPA”) BACT] guidance document page 41.” Arif, SC-85 T.66:14-24.

In fact, DEP’s witnesses admitted that neither the air permit nor DEP’s subsequent project analysis report (“PAR”) addresses how to achieve any net emission decrease, much less how to minimize the adverse effects of Unit 7’s air pollution. See SC PRO FOF ¶¶ 207-09, 225-40 (citing DEP’s admissions). Although as noted, DEP did recognize that solar can “significantly decrease the GHG emissions of [fossil fuel-burning] power plants,” FDEP-6 at 002515-18, DEP declined to consider any solar, not even bolt-on solar that can be installed directly onto Unit 7.

As such, Paragraph 46 must be modified to correct misstatements of law, as follows:

46. More simply stated, BACT is the maximum degree of emission rate reduction that is available and feasible for the source, taking into account environmental, energy, economic impacts, and other costs. However, DEP’s BACT determination is limited to considering how to lower Unit 7’s emission rate through bolt-on controls. Even for this limited determination, DEP declined to consider alternate energy technologies such as solar that could be installed directly onto Unit 7, and that can significantly decrease the GHG emissions from fossil-fuel burning power plants like Unit 7. Thus, DEP’s BACT determination did not consider how to lower the significant net increase in GHG emissions and other air pollutant emissions from Unit 7. Nor did DEP’s BACT determination consider whether and the extent to which FPL will use alternate energy.
technologies such as solar to minimize the adverse effects of Unit 7’s air pollution, much less resolve that issue.

7. Paragraphs 47 and 48

In Paragraph 47, the Judge continued to refer to the BACT determination as comprising the “most stringent emission limits,” but as discussed above they are mere emission rate limits. Likewise, the new source performance standards referred to in Paragraph 48 as “EPA-developed emissions limits” are actually emission rate limits. These are critical legal distinctions; they denote the narrow scope of the air permit, as compared to the broad scope of the Board’s minimal-adverse-effects determination. Noting the gap left by the air permit is critical, because it is this gap that the Board must fill in power plant site certification cases.

Here, the gap left by the air permit is evident from DEP’s ready admissions that it declined to consider bolt-on solar, reasoning that such solar would “redefine” FPL’s project. Indeed, for BACT determinations, permitting authorities, such as DEP and EPA, currently are not required to consider lower emission rates achievable by “redefining the source,” such as by requiring a plant that emits no GHGs in place of a proposed fossil fuel-burning plant. See, e.g., Helping Hand Tools v. U.S. EPA, 848 F.3d 1185, 1194 (9th Cir. 2016) (explaining that while “failure to consider all available [bolt-on] control alternatives in a BACT analysis constitutes clear error, EPA does not have to consider control alternatives that would ‘redefine the source’. . . [by] requir[ing] a complete redesign of the facility”). Thus, the Judge erred by describing EPA’s BACT database as one that “enables a . . . determin[ation of] the most stringent applicable control technology that meets the definition of BACT,” without recognizing that that definition and, therefore, the database encompass only certain controls to lower emission rates, as opposed to all reasonable and available controls to minimize total emissions. RO ¶ 48. The latter is for the Board to consider. See In re: Florida Power & Light Company, Manatee Orimulsion Project.
Paragraphs 47 and 48 must be modified to correct misstatements of law, as follows:

47. BACT requires a “top-down” analysis, which starts with the most stringent emission rate limits demonstrated feasible for a specific air pollution source category, as applied throughout the country. EPA has created a software tool accessible on its website, that enables a review of different source categories to determine the most stringent applicable bolt-on control technology that meets the definition of BACT for that particular source type. However, bolt-on control technologies that would “redefine a source,” such as solar that bolts onto a fossil-fuel burning power plant, but that could significantly reduce the GHG emissions from the plant, are omitted from EPA’s software tool and DEP’s BACT determination.

48. BACT also must be at least as stringent as new source performance standards (“NSPS”), which are EPA-developed emissions rate limits for specific pollutants emitted by new or modified air pollution sources within a particular source category. The NSPS applicable to combined cycle combustion turbines, such as those that will comprise Unit 7, are nitrogen oxides, sulfur dioxide, and GHGs.

8. **Paragraph 61 and Note 13**

Paragraph 61 continues to mischaracterize DEP’s BACT determination. For the reasons previously discussed, Paragraph 61 must be modified to properly convey the limits of that determination. Likewise, the Judge’s footnote to Paragraph 61 must be modified, because it fails to convey the limits of DEP’s BACT determination, and consequently mischaracterizes DEP’s consideration of carbon capture and sequestration (“CCS”) technology as part of that determination.

In fact, regarding CCS, DEP noted FPL’s citation to the federal government’s conclusion that “the research and development needed to be able to introduce CCS on a wide scale could
lead to cost-effective deployment after the year 2020.” FDEP-6 at 002515-18. This is within the relevant timeframe for Unit 7, which is projected to come online in 2022 and operate until 2062. See PSC Need Determination at 18; FDEP-1b at 001107. Yet DEP ruled out CCS for the limited purpose of its BACT determination. Beyond that determination, the record reveals that no one below inquired any further into using CCS for Unit 7, despite the undisputed fact that CCS could be available and “cost-effective.”

Accordingly, Paragraph 61 and Note 13 must be modified as follows:

61. The Air Permit limits the emissions rates for, and amounts of, GHG emissions. These are consistent with BACT, as determined by comparing DBEC’s control technology to all certain other types of bolt-on GHG control technology for CTs throughout the country. The Air Permit also imposes an extremely stringent methane monitoring requirement. Pursuant to these measures, DBEC was determined to meet the BACT requirement applicable to GHGs.13/

13/ Although the Air Permit is not subject in this proceeding to being revised or modified to impose new, additional, or different conditions, it is important to note that use of carbon capture and sequestration technology was specifically considered as part of the BACT evaluation for DBEC, and was rejected because it was determined neither technically nor economically feasible within the limited purview of BACT. However, both FPL and DEP recognized the federal government’s conclusion that “the research and development needed to be able to introduce [carbon capture and storage] on a wide scale could lead to cost-effective deployment after the year 2020.” This deployment is within the relevant timeframe for Unit 7, as FPL proposes to operate Unit 7 between 2022 and 2062. There is no evidence whatsoever to contradict that such deployment could be available and cost-effective to reduce DBEC’s GHG emissions.

9. Paragraph 67

Although the Judge found that Unit 7 will operate more than Units 4 and 5, RO ¶ 70, the Judge ignored the implications: a net increase in FPL’s GHG emissions and the related adverse
effects. Instead, the Judge made a series of “findings” in Paragraphs 67-78 that, contrary to law, allow FPL to write the standards against which Unit 7 is measured.

In Paragraph 67, the Judge erred by accepting FPL’s contention that Unit 7 will emit GHGs at a lower rate than Units 4 and 5. The legal standard is to reduce to the smallest possible degree Unit 7’s adverse effects. By contrast, a lower emission rate does not ensure any reduction in adverse effects. This is clear from the record: Unit 7 will operate for four decades, from 2022 to 2062, RO ¶¶ 18, 121; Unit 7 will operate more often and at higher capacity than Units 4 and 5, RO ¶ 337; and Unit 7 will cause a significant net increase in FPL’s GHG emissions each and every year that it operates, regardless of Unit 7 having a lower emission rate than Units 4 and 5. See SC PRO FOF ¶¶ 12-28; see also id. ¶ 208 (citing DEP’s testimony that the air permit does not limit the total mass of emissions from Unit 7). Therefore, although labeled as a finding of fact, Paragraph 67 is either an erroneous legal conclusion or a mere policy recommendation that a lower emission rate should be a standard against which Unit 7 is measured. Neither is due deference. Pub. Emps. Relations Comm’n v. Dade Cty. Police Benevolent Ass’n., 467 So. 2d 987, 989 (Fla. 1985).

To the contrary, FPL’s resort to Unit 7’s lower emission rate as compared to Units 4 and 5 must be rejected, especially because Unit 7 will actually cause a net increase in FPL’s GHG emissions compared to Units 4 and 5. See SC PRO FOF ¶¶ 12-28. In fact, DEP calculated, and no party has disputed, that replacing Units 4 and 5 with Unit 7 will lead to a “net emissions increase” of 4,754,202 tons of CO$_2$e per year—more than 60 times the amount deemed “significant” as a matter of law. Compare FDEP-6 at 002502 (“Any ‘net emissions increase’ as defined in Rule 62-210.200(210), F.A.C. of a PSD pollutant from the project that equals or exceeds the respective [significant emission rate] is considered ‘significant.’”) (emphasis in
original), with id. at 002504, Table 6 (showing that the GHG significant emission rate is 75,000 tons CO2e/year). Thus, citing Unit 7’s lower emission rate without any reference to the significant net increase in FPL’s GHG emissions from Unit 7 is misleading and contrary to the minimal-adverse-effects standard that controls this matter. As such, Paragraph 67 must be rejected in its entirety.

10. **Paragraph 68 and Note 16**

In Paragraph 68, the Judge erred by accepting FPL’s projection of a slight decrease in FPL’s system-wide GHG emissions from replacing Units 4 and 5 with Unit 7. As the Judge noted, this projection is based on FPL’s previously discussed comparison of its system under just two scenarios. See RO n. 16. But that comparison is contrary to law and policy, and is not supported by competent, substantial evidence for the reasons recited in the foregoing exceptions. As such, Paragraph 68 and Note 16 must be rejected in their entirety.

11. **Paragraph 69**

In Paragraph 69, the Judge erred by finding that replacing Units 4 and 5 with Unit 7 “may not result in reduced total amounts of GHG emissions generated at the Lauderdale Site” (emphasis in original), because Unit 7 “may operate more often.” This equivocation is unsupported by competent, substantial evidence. The Judge herself correctly found that Unit 7 “will be operated more often than other, less efficient units.” RO ¶ 70 (emphasis added). She even reiterated that Unit 7 “will be operated more frequently and at a higher capacity.” RO ¶ 337 (emphasis added).

Paragraph 69 must be modified as follows:

69. The retirement of Units 4 and 5 in 2018 and commencement of operation of Unit 7 in 2022 may will not result in reduced total amounts of GHG emissions generated at the Lauderdale Site. [emphasis in original] This is because even though Unit 7 is
substantially more efficient than Units 4 and 5—so will burn substantially less natural gas—it may will operate more often because it will be the most efficient electrical power generating unit in FPL’s electrical power generation system.

12. **Paragraph 70 and 72**

In Paragraphs 70 and 72, the Judge continued to rely on FPL’s projection of a slight decrease in FPL’s system-wide GHG emissions from replacing Units 4 and 5 with Unit 7. For the reasons discussed in Exceptions 2, 9, and 10, FPL’s projection must be rejected. Similarly, Paragraph 72 should be rejected in its entirety and Paragraph 70 should be modified to omit the unsupported projection, as follows:

70. *However, the competent, credible evidence showed that the operation of Unit 7 will reduce GHG emissions across FPL’s electrical power generating system because it will be operated more often than other, less efficient units, thereby displacing the use of those units across FPL’s electrical power generation system. Stated another way, bBecause Unit 7 will be a significantly more efficient electrical power generating unit—— meaning that it will produce more electricity per cubic foot of natural gas than FPL’s less efficient units——it will be operated more frequently than FPL’s less efficient units, resulting in reduced consumption of natural gas on a system-wide basis.*

13. **Paragraphs 74**

Although the Judge noted Sierra Club’s position that Unit 7 will “[e]mit millions of tons more [GHG] every year than the units it replaces,” RO ¶ 73, her findings in Paragraph 74 evaded this critical issue. In Paragraph 74, the Judge repeated that replacing Units 4 and 5 with Unit 7 “may” not result in reduced GHG emissions, but that FPL projects a slight decrease in system-wide GHG emissions from replacing Units 4 and 5 with Unit 7. For the reasons discussed in Exception 11, the first finding must be modified to match the record and the Judge’s own findings that Unit 7 will be operated more frequently and at higher capacity than the older, less
efficient units on FPL’s system. For the reasons discussed in Exceptions 2, 9, and 10, the second finding must be rejected in its entirety.

Accordingly, Paragraph 74 must be modified as follows:

74. As discussed above, the evidence shows that the operation of Unit 7 in conjunction with the retirement of Units 4 and 5 in 2018 may will not result in reduced GHG emissions at the Lauderdale Site [emphasis in original] because, due to its efficiency, Unit 7 may will be operated more frequently and at higher capacity. However, the competent, credible, and persuasive evidence establishes that the total GHG emissions from FPL’s electrical power plant generating units will be reduced on a system-wide basis [emphasis in original] by approximately 8,123,624 tons over the period between 2018 and 2047.

14. Paragraphs 75 and 76 and Note 20

In Paragraphs 75 and 76 the Judge reiterated incorrectly that Units 4 and 5 can operate indefinitely, and assumed a projected slight decrease in FPL’s system-wide GHG emissions would preclude further inquiry into the legally-significant, net increase in FPL’s GHG emissions from replacing Units 4 and 5 with Unit 7. Neither paragraph is due deference to factual findings, because they are not supported by competent, substantial evidence; are contrary to law; and are infused with policy considerations that are for the Siting Board to decide.

The record shows that Units 4 and 5 are obsolete. As FPL’s witnesses attested, these are old gas turbines, Kosky, May 16 AM T.147:6-9, paired with steam turbines from the 1950s, Kingston, May 15 T.76:18-19—the same type of units that FPL has retired citing challenges with finding replacements for broken parts, Sierra Club v. Brown, 243 So. 3d 903, 906 (Fla. 2018). Units 4 and 5 are also uneconomic and the possibility of operating them indefinitely was rejected by the PSC. See PSC Need Determination at 14, 16 (“FPL’s analysis highlighted that not retiring Lauderdale Units 4 and 5 would cause FPL to incur significant expenses. . . . [C]ontinued operation of Lauderdale Units 4 and 5 is uneconomic.”). FPL decided to retire these units “at the
end of 2018.” Sim, May 15 T.182:5-6; see also PSC Need Determination at 6-7 (referring to FPL’s “decision” to retire Units 4 and 5 in 2018). The PSC found a “need” to do so. PSC Need Determination at 3, 8; see also id. at 6 (considering continued operation of Units 4 and 5 through 2025).

In fact, the only evidence for the indefinite operation of these 70-year-old machines is a self-serving suggestion by FPL’s witness Dr. Sim that they could do so, without any elaboration or evidence as to how that could be feasible. See RO ¶ 75. This statement is not legally sufficient evidence, because it does not establish reasonable certainty. See Regions Bank, 118 So. 3d at 257; Devon Med., Inc., 60 So. 3d at 1128-29; Roberts v. Roberts, 689 So. 2d at 380-82. As such, the indefinite operation of Units 4 and 5 is mere speculation; there is no competent, substantial evidence for such operation (and indeed there are PSC findings to the contrary).

The position urged by FPL that its projections preclude further inquiry into the net GHG emissions increase from Unit 7 is likewise unfounded. Not only is FPL relying on the wholly-unsupported, indefinite operation scenario, but FPL is also wrong as a matter of law and policy. As discussed in previous exceptions, minimal adverse effects is the legal standard. Neither FPL nor the Board may opt out of or rewrite the standard. See Fla. H.R. v. Crist, 990 So. 2d 1035, 1050 (Fla. 2008) (“The Governor has no authority to change or amend state law. Such power falls exclusively to the Legislature.”). Furthermore, whether and on what conditions FPL may significantly increase its GHG emissions is a crucial policy question; evading the question is contrary to statutory policy to mitigate climate losses and to do so specifically through Florida’s energy choices. See, e.g., § 187.201(11)(a), Fla. Stat. (stating policy that the State of Florida “shall reduce atmospheric carbon dioxide by promoting an increased use of renewable energy resources and low-carbon-emitting electric power plants.”). FPL’s position is also contrary to
constitutional policy “to conserve and protect [Florida’s] natural resources and scenic beauty.” See Art. II, §7(a), Fla. Const.

Paragraphs 75 and 76 and Note 20 must be rejected in their entirety.

15. **Paragraph 77**

In Paragraph 77, the Judge concluded that Unit 7 “meets all applicable state and federal air regulatory and permitting requirements.” The Judge did not specify whether these requirements refer exclusively to the “nonprocedural requirements of agencies,” defined in section 403.503(21), Fla. Stat., and enumerated as one of the Board’s considerations in section 403.509(3), Fla. Stat. But as noted above, throughout the proceeding below the Judge mistakenly conflated the nonprocedural requirements (i.e., predicate permits) with other requirements under section 403.509, such as the minimal-adverse-effects requirement. Any conclusion that Unit 7 meets the latter requirement is not supported by competent, substantial evidence, and is contrary to law and policy, as discussed in the foregoing exceptions.

Accordingly, Paragraph 77 must be modified to avoid an erroneous legal conclusion, as follows:

77. In sum, FPL demonstrated that DBEC meets all applicable state and federal air regulatory and permitting requirements for DBEC and, specifically, for Unit 7. **To be clear, this demonstration complies solely with the “nonprocedural requirements” under section 403.509(3)(b), Fla. Stat., not other requirement under section 403.509(3).**

16. **Paragraph 78**

In Paragraph 78, the Judge continued to misinterpret DEP’s BACT determination and thereupon impermissibly limited the Siting Board’s jurisdiction, essentially reducing the Board to a rubber stamp of whatever DEP decided in the air permit. This is flatly wrong for the reasons discussed in the foregoing exceptions.
Indeed, the Board itself has recognized the limits to a BACT determination and the Board’s distinct role in deciding the environmental aspects of power plants. For instance, in In re: Florida Power & Light Company, Manatee Orimulsion Project, Application 94-35, Case No. 94-5675 at ¶ 7 (final order on remand), the Board upheld a BACT determination that failed to consider potential emission reductions from switching the fuel for FPL’s proposed power plant. Agreeing that “the ALJ properly rejects the idea of mandating FPL to use natural gas” via the BACT determination, the Board recognized that the air permit did not alter any discretion the Board “may have . . . to consider fuel alternatives in a power plant siting decision.” Id.

Likewise, the air permit here does not alter the Board’s duty to minimize the adverse effects of Unit 7’s air pollution, nor its duty to consider alternate energy technologies to that end. This is because section 403.509(3), Fla. Stat., does not merely require the Board to consider whether Unit 7 meets nonprocedural requirements, which are encompassed in the predicate permits, such as the air permit. Other subparts of section 403.509(3) require the Board to consider other issues, such as whether Unit 7 meets the minimal-adverse-effects standard under (3)(f). Conflating the requirements in (3)(b) and (3)(f) violates the rules of statutory construction, which prohibit reading any statutory text as mere “surplusage.” See State v. Knighton, 235 So. 3d 312, 316 (Fla. 2018) (citations omitted). Because the Judge so conflates these requirements in Paragraph 78, it must be modified to correct this legal error, as follows:

78. As discussed above, FPL demonstrated that DBEC will meet the applicable BACT requirement—which literally means the best available control technology—for GHG emissions, as well as other emissions from Unit 7 and other emissions sources. **However, DEP’s BACT determination is limited to considering how to lower Unit 7’s emission rate through certain bolt-on controls. Even for this limited determination, DEP declined to consider alternate energy technologies such as solar that could be installed directly onto Unit 7, and that can significantly decrease the GHG emissions from fossil-burning power plants.**
such as Unit 7. Thus, DEP’s BACT determination did not consider how to lower the significant net increase in GHG emissions from replacing Units 4 and 5 with Unit 7. Nor consequently did DEP’s BACT determination resolve that FPL will use reasonable and available methods to minimize the adverse effects of Unit 7’s air pollution. Additionally, the air construction/PSD permit establishes emissions rate limits for DBEC, and, specifically, for Unit 7, and FPL demonstrated, to DEP’s satisfaction, that its emissions control technology will meet the applicable standards, which are more stringent than applicable NSPS limits. Thus, FPL demonstrated that DBEC will meet state and federal law regarding emissions limitations for GHGs and other pollutants emitted by DBEC.

17. **Paragraph 80 and 82**

Regarding the environmental impacts of Unit 7’s air pollution, the Judge continued to misinterpret DEP’s BACT determination and thereupon impermissibly limited the Board’s jurisdiction to consider such impacts. As explained in Exception 16, the Board is not a mere rubber stamp for whatever DEP decided in the air permit and the Judge’s erroneous legal conclusions must be rejected.

In particular, the Judge’s citation to EPA’s BACT guidance in Paragraph 80 is misplaced. The guidance does not control here for several reasons. First, the guidance is silent regarding the Board’s minimal-adverse-effects determination, it only speaks to DEP’s BACT determination. The guidance is also just that: its legal conclusions are inherently not binding. EPA’s use of hortatory terms such as “should,” as opposed to mandatory terms such as “shall,” preclude any doubt. EPA also expressly affirmed the limits of a BACT determination and its focus on controls that are installed directly onto the power plant to regulate its emission rate:

EPA has historically interpreted the BACT requirement to be inapplicable to secondary emissions, which are defined to include emissions that may occur as a result of the construction or operation of a major stationary source but do not come from the source itself. Thus, under this interpretation of EPA rules, a BACT analysis should not include (in Step 1 of the process) energy
efficient options that may achieve reductions in a facility’s demand for energy from the electric grid but that cannot be demonstrated to achieve reduction in emissions released from the stationary source (e.g., within the property boundary). Nevertheless, as discussed in more detail below, EPA recommends that permitting authorities consider in a portion of the BACT analysis (Step 4) how available strategies for reducing GHG emissions from a stationary source may affect the level of GHG emissions from offsite locations.

SC-85, Arif Depo. Ex. 7, EPA, PSD and Title V Permitting Guidance for Greenhouse Gases 24 (2011). Plainly, EPA acknowledged that alternate energy technologies, such as demand-side energy efficiency, are not part of BACT because BACT looks only at the emission rate of the power plant itself. However, EPA did not deny that such technologies can achieve emissions reductions; EPA simply said that the reduction may not occur “within the [plant’s] property boundary,” and urged states to consider their occurrence elsewhere on the system. Precisely because EPA was only providing guidance, consideration of such reductions is left to the permitting agency’s discretion.

Here, DEP exercised its discretion in a very limited way: noting that FPL planned to add 2,420 MW of solar by 2023, DEP summarily concluded that “over the life of Unit 7, the operating profile will vary with more cycling expected as solar generating capacity increases.” FDEP-6 at 002517. DEP did not condition the air permit on FPL actually adding any solar. See generally FDEP-7. Nor, as noted in Exception 6, did DEP even attempt to limit the net emission increase from Unit 7 for any air pollutant. In sum, DEP’s BACT determination is no substitute for the Board’s minimal-adverse-effects determination and, specifically, the Board’s inquiry into alternate energy technologies such as solar that can significantly decrease the GHG emissions from fossil fuel-burning power plants like Unit 7.

The Judge also misinterpreted a passage in EPA’s guidance that “recommends” air permitting authorities not to focus on “the endpoint impacts of GHGs,” because “[q]uantifying
these exact impacts attributable to the specific GHG source obtaining a permit in specific places is not currently possible with climate change modeling.” RO ¶ 80. From this the Judge drew two conclusions: (1) the Board cannot consider the impacts of the significant net GHG emissions increase from Unit 7 at all, and (2) the Board cannot consider the cumulative impacts of GHG emissions from Unit 7 combined with existing and reasonably foreseeable future GHG emissions. The Judge’s conclusions cannot be right, because she herself found that Southeast Florida is “particularly vulnerable” to climate losses and that climate change is a cumulative problem. Just because “exact impacts” cannot be traced to a particular power plant does not mean that the plant’s measurable and quantifiable net GHG emissions and their corresponding contribution to climate losses should be entirely ignored. To the contrary, the guidance exhorts consideration of the “relative levels of GHG emissions,” but for the reasons previously discussed BACT does not ensure that this level is actually minimized. Rather, the Siting Act mandates that the Siting Board do so.

Accordingly, Paragraphs 80 to 82 should be rejected in their entirety as erroneous legal conclusions.

18. **Paragraphs 83 to 100**

Regarding the social cost of carbon, the Judge reached erroneous legal conclusions, mislabeled as findings of facts. To be sure, the Judge is correct that “for each incremental ton of carbon emissions, there is an incremental amount of harm,” and that “the social cost of carbon is the economic cost per ton of emissions.” RO ¶ 84. The Judge was also correct that Sierra Club’s expert on the social cost of carbon Dr. Ackerman “estimated that the monetary impact to

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15 EPA’s guidance does not define “level,” therefore, its plain meaning should be used: “amount of something that exists, especially when it is counted or measured.” Level, Cambridge English Dictionary Online (2018).
Florida’s economy from climate change may be between $500 million to $1.1 trillion annually by 2100.” RO ¶ 92. Using the federal government’s social cost of carbon estimate, the cost of Unit 7’s emissions “would range from $213 million to $289 million on an annual basis.” RO ¶ 91. Using Columbia University and Rhodium Group’s estimate of climate damages, the cost to Florida of Unit 7’s emissions ranges “from $8.4 million and $27 million per year.” RO ¶ 93. By contrast, “Dr. Sim acknowledged that the social costs of carbon were not considered as part of the modeling” underpinning FPL’s projections.\(^\text{16}\) RO ¶ 24.

Yet the Judge concluded that Unit 7’s exorbitant environmental and human health costs should be ignored, in deference to FPL’s projection of a slight decrease in FPL’s system-wide GHG emissions from replacing Units 4 and 5 with Unit 7. This is flatly wrong. FPL’s projections and the Judge’s deference to them must be rejected for the reasons discussed throughout the foregoing exceptions. FPL’s proffer of its projection not only lacks legally sufficient supporting evidence, it is also a bald attempt to rewrite the standard against which Unit 7 is measured. But the applicable standard is for the Legislature, not FPL or the Siting Board, to decide. See Fla. H.R. v. Crist, 990 So. 2d at 1050 (“The Governor has no authority to change or amend state law. Such power falls exclusively to the Legislature.”).

Here, the applicable standard is the minimal-adverse-effects standard, for good reason. Absent deep GHG reductions, a substantial body of research shows that “Florida will experience the greatest damage from climate change—which is projected to negatively impact the state’s gross domestic product (“GDP”) by between 10 and 24 percent by 2100.” RO ¶ 92. And, undisputedly, Unit 7 emits GHGs and thus contributes to climate change and sea level rise, to

\(^{16}\) This refers to the same modeling and modeling-derived projections that have been discussed throughout the foregoing exceptions, wherein FPL compared just the indefinite operation scenario and FPL’s proposal under review.
which Southeast Florida is “particularly vulnerable.” RO ¶ 185. As such, denying certification of Unit 7 is the clearest path to averting catastrophic climate damages to Florida. But if Unit 7 were approved, approval must be conditioned on the commonsense measures proposed by Sierra Club to reduce Unit 7’s GHG emissions.

Approval without Sierra Club’s proposed conditions would be unlawful and unconscionable, because neither FPL nor the reviewing agencies below ever even examined meaningfully expanding alternate energy technologies such as solar that “can significantly decrease the GHG emissions from a power plant” like Unit 7. FDEP-002515. As previously discussed, FPL only evaluated such technologies for the sole purpose of mitigating the need for Unit 7. Based on the results of FPL’s limited examination, the PSC found that a combination of solar and batteries could entirely forestall the need to build Unit 7, but that that combination may cost more than Unit 7. However, the PSC did not perform any cost-benefit analysis of alternate energy technologies for the purpose of minimizing Unit 7’s adverse effects. Likewise, DEP noted FPL’s non-binding plan to install 2,420 MW of solar by 2023. But DEP performed no analysis whatsoever, much less any cost-benefit analysis, to decide how much solar FPL must use to minimize Unit 7’s adverse effects. Since the Siting Act commits that decision to the Board, it must consider Unit 7’s massive adverse effects, as reflected in their estimated cost in the record.

Ignoring Unit 7’s massive adverse effects, as the Judge recommends, would leave the local community and the rest of Southeast Florida gratuitously exposed to unchecked climate damages. That result is contrary to the Board’s mandate to protect the interests of the public in the Siting Act, sections 403.502 and 403.509, Fla. Stat., and contrary to the general policy mandate to mitigate climate losses through the promotion of alternate energy technologies,
section 187.201(11)(a), Fla. Stat. As such, the Judge’s recommendation must be rejected. In addition, there should be a remand on this issue. The Judge wrongly barred Sierra Club from presenting evidence that was necessary for the Board to render an informed judgement regarding how much alternate energy technologies FPL must use to actually minimize Unit 7’s massive adverse effects. See May 4 Order; see also State v. Murciano, 163 So. 3d at 665 (remanding cases back to the hearing office for failure to comply with the essential requirements of law); Cohn v. Dep’t of Prof. Regulation, 477 So. 2d at 1047 (“When the [hearing officer] charged with finding facts upon the evidence presented . . . has, for whatever reason, failed to perform this function, the appropriate remedy is not for the agency . . . to reach its own conclusion, but rather to remand for the [hearing] officer to do so.”).

Accordingly, Paragraph 96 must be rejected in its entirety. Paragraph 99 must be modified, as follows, and the issue should be remanded for the Judge to take evidence on alternate energy technologies to minimize Units 7’s massive adverse effects, including specifically those effects as measured by the social cost of carbon:

99. **While the evidence shows that GHG emissions from DBEC will result in increased social costs of carbon on a per-ton basis compared to a zero emissions baseline, the competent, substantial, and persuasive evidence establishes that the operation of Unit 7 will reduce FPL’s GHG emissions on a system-wide basis by approximately 8.1 million tons by 2047, due to the retirement of older, less efficient Units 4 and 5 and the reduced use of older, less efficient generating units that produce greater quantities of GHG emissions.27/**

19. **Note 27**

In Note 27, the Judge reiterated the erroneous legal conclusions, mislabeled as factual findings, that Units 4 and 5 can operate indefinitely. Specifically, in response to Sierra Club’s point that replacing Units 4 and 5 with Unit 7 will result in a net increase in GHG emissions, the
Judge stated that this point “appears [to be] based on the assumption that Units 4 and 5 will be retired in 2033 and, presumably, will not be replaced at all or else will be replaced with generating technology.” Thereupon the Judge stated that there is no support in the record for the retirement of Units 4 and 5 in 2033.

But Sierra Club’s point is actually based on the PSC’s need determination order, which is the law controlling this issue, and which the Judge inexplicably ignored. In its order, the PSC considered but rejected multiple alternatives to replacing Units 4 and 5 with Unit 7, to meet FPL’s need for more energy generation. These alternatives included Unit 4 and 5’s continued operation (but not necessarily indefinitely); building out solar and batteries instead of Unit 7; and building Unit 7 later. See PSC Need Determination at 6, 8, 14-16. The PSC found Units 4 and 5’s continued operation “uneconomic.” Id. at 16. Therefore, the Judge cannot assert that operating Units 4 and 5 indefinitely is feasible, let alone the only alternative to FPL’s proposal, because that assertion runs counter to the PSC’s order.

In addition, the Judge’s conclusion that there is no support “for any specific type of power generating technology or type that may or may not be used by FPL in the future,” is simply not true, notwithstanding the Judge’s May 4 Order. In fact, the PSC found that FPL could build out solar and batteries instead of Unit 7, but rejected this alternative for the limited purpose of mitigating the need for Unit 7. See PSC Need Determination at 8. Thus, the PSC’s order supports the reality that FPL could add alternate energy technologies such as solar and batteries in the future. So does FPL’s non-binding plan to add 2,420 MW of solar by 2023. FDEP-6 at 002517. The only reason that there is not more support in the record is the Judge wrongly barred Sierra Club from introducing evidence on this issue. As previously discussed, that was procedural error, so the Board must either deny the certification, condition certification as
proposed by Sierra Club, or remand the matter to the Judge to take additional evidence. Either way, Note 27 must be rejected in its entirety because it consists of erroneous legal conclusions.

20. **Paragraph 95**

The Judge erred by concluding that “Ackerman did not perform any analysis of DBEC’s economic effects on the local community.” RO ¶ 95. To the contrary, the Judge’s own findings contradict this conclusion: She found that climate change is occurring “locally, including in Southeast Florida.” RO ¶ 174. Further, she found that communities in Southeast Florida, including the neighborhood adjacent to the proposed site for Unit 7, are “particularly vulnerable” to sea level rise. RO ¶ 185. And she found that Ackerman “use[d] . . . the valued damage of global climate change to Florida” to reach his more conservative estimates of “the damage resulting from DBEC’s annual carbon dioxide emissions.” RO ¶ 93. Thus, Dr. Ackerman’s analysis does encompass the economic effects to the local community; indeed, he further attested:

I mentioned the damage [from climate change] to the tourism industry from hotter, stormier weather and loss of beach environments. There are damages to human health, both health-related mortality and the spread of tropical diseases. . . . At six feet of sea level rise nationwide, millions of people would lose their homes . . . Miami-Dade and Broward counties alone account for a quarter of the entire U.S. population which would lose their homes to that much sea level rise.

Ackerman, May 17 T.280:19-23, T.281:8-12.

Paragraph 95 must be rejected in its entirety.

21. **Paragraph 100**

The Judge erred in finding that Unit 7 will result in lower social costs of carbon relative to the indefinite operation scenario. Neither FPL nor any agency below ever even considered the social costs of the carbon emitted by Unit 7. See SC PRO FOF ¶¶ 213-25. Further, and more
fundamentally, the only support the Judge cites for lower social costs is FPL’s projections, which are contrary to law, policy, and the record, as discussed in the foregoing exceptions.

Paragraph 100 must be rejected in its entirety.

22. **Note 28**

The Judge erred in concluding that “no state or federal rules or regulations applicable to permitting electrical power plants impose [the consideration of the social cost of carbon as] a requirement.” RO n. 28. This is wrong as a matter of law. The Siting Act expressly requires consideration of the “adverse effects” of proposed power plants.\(^\text{17}\) § 403.509(3)(f), Fla. Stat. The Judge herself found that the social cost of carbon is a measure of these adverse effects. As such, the Board owes no deference to the Judge’s conclusion, because it is contrary to plain statutory language and her own finding. See § 120.57(1)(l); B.J. v. Dep’t of Children & Family Servs., 983 So. 2d 11, 13 (Fla. 1st DCA 2008) (citations omitted) (“The law is well established that . . . an agency may reject conclusions of law without limitation.”); cf. Gross v. Dep’t of Health, 819 So. 2d 997, 1002 (Fla. 5th DCA 2002) (citing McDonald v. Dep’t of Banking & Fin., 346 So. 2d at 569) (explaining “deference rule” that, even on determinations of facts, “matters infused with overriding policy considerations are left to agency discretion”).

Additionally, the Judge acknowledged the “compelling” evidence on the “need to exigently address” climate change, but she recommends against doing so, reasoning that it is “extremely difficult, at this juncture to accurately perform cost/benefit analyses regarding climate change.” RO n. 28. Yet despite this difficulty, the Judge herself found, “it is possible to arrive at estimates that represent a ‘floor,’ or minimum value, of damage due to GHG emissions from a specific project.” RO ¶ 91. In fact, for Unit 7’s GHG emissions, Dr. Ackerman estimated

\(^{17}\) The focus here is on section 403.509(3)(f), Fla. Stat., because it is critical to the proper disposition of this case. Sierra Club does not concede that the consideration of the social cost of carbon is not required under other state and federal law.
that on the low end the damage will cost Florida *hundreds of millions of dollars*. Compare RO ¶ 93 ("[D]amages resulting from DBEC’s annual carbon dioxide emissions would range from $8.4 million and $27 million per year."), with id. ¶ 121 ("DBEC has a design life of 40 years."). See also RO ¶ 91 (finding that by another conservative estimate, the “damages due to carbon dioxide emitted by DBEC would range from $213 million to $289 million on an annual basis”). By the same estimates, Unit 7 will cost at least **three times more** than its alleged benefits. RO ¶¶ 93-94.

Whether a fossil fuel-burning plant with costs that could so “greatly outweigh” any benefits to Floridians is in the public interest is a question infused with policy considerations. RO ¶ 94. As such, the Board owes no deference to the Judge’s opinion that the cost-benefit analysis—and the corroborating evidence, see SC PRO FOF ¶¶ 163-202 (citing the evidence)—in the record should be disregarded. See, e.g., McDonald, 346 So.2d at 579 (noting that courts will accord agencies more leeway to disturb findings of fact that are “infused by policy considerations for which the agency has special responsibility”). Rather, the Board itself must decide how to minimize the massive adverse effects of Unit 7, be it through the denial of Unit 7, Sierra Club’s proposed conditions, or a remand to the Judge to take evidence on alternative energy technologies.\(^\text{18}\)

For the foregoing reasons, Note 28 must be rejected in its entirety because it consists of an erroneous legal conclusion paired with an unsound policy recommendation.

**23. Paragraphs 101 to 103 and Note 29**

In Paragraphs 101 to 103 and Note 29, the Judge responded to Sierra Club’s position that the Board must consider the “life-cycle” impacts of operating Unit 7, which are the impacts of all

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\(^{18}\) As a practical matter, the social cost of carbon will help the Board reach an informed decision, just as it has decision-makers in other states. See Peter Fairley, States Are Using Social Cost of Carbon in Energy Decisions, Despite Trump’s Opposition, Inside Climate News (Aug. 14, 2017), https://goo.gl/tYWiok (citing recent energy-related decisions where New York, Minnesota, Illinois, and Colorado have used the social cost of carbon).
the GHGs emitted “from start to finish, . . . from gas generation to gas burn” by Unit 7. RO ¶ 101 (citing Kosky, May 16 AM T.109:13-17). In her response, the Judge reached several erroneous legal conclusions, mislabeled as findings of fact. She also inexplicably focused only on the GHGs emitted by transporting fossil fuels by pipeline to Unit 7, and disregarded the additional GHGs emitted by generating those fuels by extracting them from the ground. For the reasons below, this response must be rejected in its entirety and there should be a remand to the Judge to take evidence on Unit 7’s life-cycle impacts.

In essence, the Judge reiterated her erroneous legal conclusion that the adverse effects of the fuel pipeline to Unit 7 are “beyond the scope of this proceeding.” RO ¶ 101. But as discussed in Exception 1, this conclusion must be rejected. Section 403.509(3)(f), Fla. Stat., does not limit consideration of a proposed power plant’s adverse effects to only those that are traceable to facilities that are owned by the applicant. By reading such a limit into the statute, the Judge reached either an erroneous legal conclusion or offered an unsound policy opinion; neither is due deference. See Pub. Emps. Relations Comm’n, 467 So. 2d. at 989 (interpretation of applicable statutes involves “law and policy and not a determination of fact”). Rather, the Board itself must interpret applicable statutes consistent with the Legislature’s intent and objectives, id., and ignorance of life-cycle impacts is clearly not what the Legislature had in mind.

Across several statutes related to Florida’s energy choices, the Legislature established policy mandates, incumbent on all agencies, to limit the adverse effects of fossil fuel-burning power plants: “[i]t is the policy of the State of Florida to . . . [c]onsider the whole-life-cycle impacts of any potential energy use choices, so that detrimental effects of these activities are understood and minimized.” § 377.601(2)(j), Fla. Stat. (emphasis added). This policy mandate supports consideration of the pipeline’s adverse effects, as they are part of the “whole-life-cycle
impacts” of FPL’s choice to burn fossil fuel to generate energy. The Judge’s conclusion to the contrary is due no deference.

In particular, the Judge is wrong that the Board has no authority to consider life-cycle impacts merely because the above-quoted policy on life-cycle impacts appears in a statute that is administered by another agency. Statutes must be harmonized under long-standing precedent, and the result fully supports the Board’s consideration of life-cycle impacts in this case. As explained in Forsythe v. Longboat Key Beach Erosion Control District, “[w]here possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another.” 604 So. 2d 452, 455 (Fla. 1992) (emphasis in original) (citation omitted). Here, it is not only possible but easy to give full effect to both the Siting Act’s mandate to minimize the adverse effects of a proposed power plant, and to the above-quoted policy mandate to consider “whole-life-cycle impacts of any potential energy use choices, so that detrimental effects of these activities are understood and minimized.” § 377.601(2)(j), Fla. Stat. The Siting Act is silent regarding the proper scope of adverse effects to be considered in the power plant siting context, and a new power plant, such as Unit 7, is undeniably an energy use choice. The fact the Legislature charged another agency with adopting rules to implement policy on life-cycle impacts quoted above, and that agency has not yet done so, does not diminish the legal force of the existing statutory policy. Nor does that fact upend the Board’s “ultimate authority” to interpret the Siting Act provisions expressly committed to the Board consistent with statutory policy. See Pub. Emps. Relations Comm’n, 467 So. 2d. at 989. Indeed, this is precisely what the Board must do.

For similar reasons, the Judge was wrong to preclude Sierra Club from introducing evidence on Unit 7’s life-cycle impacts. Like the evidence on alternate energy technologies, this
evidence should have been allowed, as it is crucial to the Board’s minimal-adverse-effects
determination. See State v. Murciano, 163 So. 3d at 665 (remanding cases back to the hearing
office for failure to comply with the essential requirements of law); Cohn v. Dep’t of Prof.
Regulation, 477 So. 2d at 1047 (“When the [hearing officer] charged with finding facts upon the
evidence presented . . . has, for whatever reason, failed to perform this function, the appropriate
remedy is not for the agency . . . to reach its own conclusion, but rather to remand for the
[hearing] officer to do so.”).

For the foregoing reasons, Paragraphs 100 to 103 and Note 29 must be rejected in their
entirety and there should be a remand to the Judge to take evidence on life-cycle impacts.

24. **Paragraphs 104 to 105**

The cumulative problem of climate change requires cumulative impacts analysis; the
Judge’s opinion to the contrary is due no deference and must be rejected. Specifically, in
Paragraphs 104 and 105, the Judge responded to Sierra Club’s position that the Board must
consider the cumulative climate losses of Unit 7’s GHG emissions “combined with those from
‘other existing and foreseeable permitted sources in Florida and elsewhere.’” RO ¶ 104 (citing
Arif, SC-85 T.67:18-23). The Judge’s response makes two fatal errors: first, that the law
applicable to the air permit does not require cumulative impacts analysis, and, second, that
EPA’s BACT guidance rules out such analysis, because “determining the exact impacts
attributable to a specific GHG source is not possible under current climate change modeling.”
RO ¶ 105. Both are wrong as a matter of law and policy.

As previously discussed, the Siting Act requires the Board’s disposition of this case to
protect the “broad interests of the public” and to “minimize” Unit 7’s “adverse effects.” §§
403.502, 403.509(3), Fla. Stat. These requirements are infused with policy considerations,
especially as catastrophic climate losses threaten human health and the environment throughout the state, and “particularly” in Southeast Florida. RO ¶¶ 185-87. Therefore, the Board, not the Judge, has the “ultimate authority” to decide these matters. See Pub. Emps. Relations Comm’n, 467 So. 2d. at 989. And the Board must reject the Judge’s opinion that the Board should rubber stamp whatever DEP decided in the air permit, because air permitting law simply does not control this matter. See In re: Florida Power & Light Company, Manatee Orimulsion Project, Application 94-35, Case No. 94-5675 at ¶ 7 (final order on remand) (finding that the Board’s authority under the Siting Act was not limited by an air permit for a proposed power plant).

It is well-established under Florida law that decision-makers can and should consider “the cumulative impacts of similar projects which are existing, under construction, or reasonably expected in the future.” Conservancy, Inc., 580 So. 2d at 778. EPA’s BACT guidance is neither contrary nor binding on this Board. In fact, EPA acknowledged, “the environmental concern with GHGs is with their cumulative impact in the environment.” SC-85, Arif Depo. Ex. 7, EPA, PSD and Title V Permitting Guidance for Greenhouse Gases 46 (2011). Contrary to what the Judge elided, EPA never said that cumulative impacts analysis is not possible; instead, EPA only said that “[q]uantifying the exact impacts attributable to a specific GHG source obtaining a permit in specific places and points would not be possible with current climate change modeling. Id. at 48. (emphasis added). But tracing impacts in specific places and points back to a proposed power plant is not the relevant inquiry under the Siting Act. The Board must reject the Judge’s opinion that the Board either cannot or should not grapple with Unit 7’s share of cumulative climate losses to Florida. As previously discussed, the Judge expressly found that the record contains competent, substantial evidence of those losses. RO ¶¶ 173-193. The Judge also recognized the evidence that Sierra Club introduced on the monetary value of Unit 7’s share, but she reached the
erroneous legal conclusion that the Board should disregard this value, in deference to FPL’s projection of a slight decrease in FPL’s system-wide GHG emissions from replacing Units 4 and 5 with Unit 7. For all the reasons discussed in the foregoing exceptions, that conclusion must be rejected.

Instead, Florida law and the facts of this case demand that the Board consider cumulative climate losses. Under Florida’s cumulative impacts doctrine, courts have recognized that cumulative impacts are part of the inquiry into whether a particular project is in the public interest. See Conservancy, Inc., 580 So. 2d at 778. The cumulative impacts doctrine applies to climate losses because climate change is the classic problem of many sources of pollution adding up to unsustainable cumulative impacts. Absent deep GHG reductions, “Florida will experience the greatest damage from climate change.” RO ¶ 92. To uphold its twin duties to minimize cumulative climate losses and protect the broad interests of the public, the Board therefore must consider those losses. Cf. Dr. Peyton Z. Peebles, Jr. v. State of Florida, Dep’t of Env’t Regulation, Case No. 89-3725 at 11 (Fla. DOAH Feb. 28, 1990; Fla. DER Apr. 11, 1990) (citation omitted) (in a wetland permitting case, “without the ability to consider long-term impacts of a project (in combination with similar projects in the area considered ‘reasonably likely’), [the reviewing agency] would be helpless to prevent gradual worsening of water quality and piece-meal elimination of biological resources inflicted by a proliferation of small projects.”).

Here, the record established that Florida’s cumulative climate losses could be staggering, absent deep GHG reductions. However, because the Judge barred evidence of GHG emissions that were not emitted directly by Unit 7 or by associated facilities owned by FPL, and barred evidence on alternate energy technology, the Board cannot meaningfully consider how to
minimize Unit 7’s adverse effects in the context of cumulative climate losses. Sierra Club proposed a practical solution: require FPL itself to evaluate how to do so and submit that evaluation for the Board (or DEP’s) consideration at least once every five years. Alternately, the Board can remand this matter to the Judge to take evidence on alternative energy technologies with instructions to develop cost-benefit analysis for the same taking into account cumulative climate losses. Either way, Paragraphs 104 and 105 must be rejected in their entirety for the foregoing reasons.

25. **Paragraphs 106 to 108**

The Judge’s conclusion that section 403.519, Fla. Stat., precludes the Board from considering alternate energy technologies is wrong as matter of law for the reasons discussed in the foregoing exceptions. Paragraphs 106 to 108, which reassert this conclusion, mislabeled as findings of fact, must be rejected in their entirety.

26. **Paragraphs 121 to 126, 128 to 130, 136**

The Judge found that FPL’s proposed elevation for Unit 7’s power block (the main power generation facilities) should be measured against the sea level rise projection known as the “USACE high curve.” RO ¶¶ 118-20. However, this is a question of law and policy for the Board to decide. See Baptist Hosp., Inc., 500 So. 2d at 623 (“Matters infused with overriding policy considerations are left to agency discretion.”). A review of the entire record reveals that NOAA high curve is the more reasonable choice, because, as FPL’s expert explains, where there is little tolerance for risk, such as when considering a new power plant, decision makers planning for sea level rise should use the highest projection. Maul, May 16 PM T.123:12 to 125:7, T.130:21 to 131:3. Accordingly, Paragraphs 121 to 126, 128 to 130, and 136 must be rejected in their entirety.

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19 The power block would hold two combustion turbines, the two heat recovery steam generators, and the one steam turbine. Kingston, May 15 T.56:8-17; FPLJKK-28.
entirety.

27. **Paragraph 127**

There is no competent, substantial evidence that certain existing structures that Unit 7 would rely on to operate, RO ¶ 8, but that FPL will not elevate, RO ¶ 9, are “unlikely” to flood by 2060, RO ¶ 127. In fact, this prediction is directly contradicted by the Judge’s findings of fact in Paragraphs 123 to 136. As noted above—though the Judge reached the wrong policy conclusion—she made a series of predicate findings that the USACE high curve should be used as the sea level rise projection against which the elevation of Unit 7’s power block is measured. Under that projection, FPL itself calculated that an elevation of 8.75 feet above mean sea level is necessary to protect against sea level rise by 2062. But FPL would leave the existing infrastructure at between 6 and 7 feet above mean sea level. Clearly, if the power block must be raised to 8.75 feet to avoid flooding, then the existing infrastructure that power block relies on to operate must be raised that high, too. *Wiggins*, 209 So. 3d at 1173 (citation omitted) (stating that competent, substantial evidence must be reasonable and logical).

Nor is the mere fact that the existing structures “were constructed in compliance with the regulatory requirements in effect at the time they were approved” legally sufficient evidence for the Judge’s prediction that flooding is “unlikely.” RO ¶ 127. As the Judge correctly found, the rates of sea level rise “accelerate” due to climate change. RO ¶ 181. So even if sea level projections were used when the structures were built, those projections may no longer be reasonable. Speculation and conjecture are not competent, substantial evidence. See *Callwood v. Callwood*, 221 So. 3d at 1202 (citation omitted); *Regions Bank*, 118 So. 3d at 257 (explaining that a prediction is speculative if it is subject to assumptions or changing circumstances, unless

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20 The existing structures “include[] existing fuel and storage tanks, an existing gas transmission pipeline, existing electrical transmission lines, existing cooling water intake at the Dania Cutoff Canal, and existing cooling water discharge structures.” RO ¶ 8.
the prediction can be established with reasonable certainty).

In fact, the substantial, competent evidence in the record establishes that, left un-elevated, the existing structures very well could flood, but that FPL never even evaluated that flood risk: FPL’s civil engineer Mr. Barranco admitted that some existing structures, like the substation and switchyard, and the fuel oil tank area, are located within FEMA’s 100-year flood zone. Barranco, May 16 PM T.77:9 to 78:10; FDEP-1 at 000083. Mr. Barranco also admitted that the existing structures that are at six or seven feet North American Vertical Datum 88 (“NAVD 88”) or less could be flooded. Barranco, May 16 PM T.81:17-21. Likewise, FPL’s own documentation acknowledges “a potential future flood elevation of approximately 7.75 feet NAVD 88,” FDEP-1 at 001107. Yet Mr. Barranco admitted that evaluating the potential for flooding of the existing structures was outside the scope of his work. Barranco, May 16 PM T.83:4-21. So he did not evaluate the potential for them to be flooded. Barranco, May 16 PM T.83:17-21. As such, there is no competent, substantial evidence that the existing structures will not be flooded, because FPL had no such evidence to provide.

To make matters even worse, FPL did not address the flood risk of other existing structures, such as homes in the adjacent neighborhood and access roads to Unit 7. Nor for that matter did the Judge. The neighborhood and roads—at an elevation of only about two to three feet above sea level—are projected to flood due to sea level rise under all of the projections in the record. SC-15, Sea Level Rise Maps; Wanless, May 17 T.180:5 to 181:25, T.205:25 to 206:2, T.242:10-17; SC-59, LiDAR Elevation Maps Proposed Project Site Area; SC-15, Sea Level Rise Maps. But FPL does not plan to help elevate the neighborhood or the roads, contrary to the advice of its own experts. Kingston, May 15 T.136:18-20; see also FDEP-1 at 001106 (noting that FPL experts recommended elevating the plant area roads to 10 feet NAVD 88). If the roads
used to access Unit 7 are submerged, which they are likely to be, Unit 7 cannot provide electricity in a safe, orderly and reliable manner, thus failing to meet the criteria in section 403.509(3)(a) and (d).

In short, during the 40-years that Unit 7 is supposed to operate, areas around the power block which are not being elevated will, under the USACE or NOAA projections, be surrounded by saltwater, and water that has “strong tides and waves.” Wanless, May 17 T.220:11 to 221:8.

For all the foregoing reasons, Paragraph 127 must be modified as follows:

127. As noted above, certain existing infrastructure is not being replaced, so will not be elevated. These structures, which were constructed in compliance with the regulatory requirements in effect at the time they were approved, are constructed at six to seven feet NAVD88 above mean sea level. **The highest flood elevation on the FEMA Map is at elevation 5.5 feet NAVD88 in 2060. Thus, it is unlikely that these structures will be subject to flooding by 2060. FPL failed to adduce any evidence whatsoever that these structures will not flood during Unit 7’s proposed 40-year operational life. Additionally, the adjacent neighborhood and access roads to Unit 7 are at two to three feet above mean sea level and are extremely vulnerable to flooding under all of the sea level rise projections in the record. But FPL does not propose to elevate these roads, or to help elevate the adjacent neighborhood.**

28. **Paragraphs 246 and 247 and Note 55**

For the reasons discussed in Exceptions 2, 14, and 19, the notion that Units 4 and 5 can operate indefinitely is not supported by competent, substantial evidence and must be rejected. However, in Paragraph 246, the Judge goes one step further to conclude that operating Units 4 and 5 indefinitely is the “only alternative” to building Unit 7. This, too, is not supported by competent, substantial evidence, because the Judge relies on the PSC’s need determination, and as previously discussed in Exceptions 2, 14, and 19 that determination found multiple alternatives. Accordingly, Paragraphs 246, 247, and Note 55 should be struck in their entirety.
29. **Paragraphs 248 and 249**

As explained in Exception 2, 10, 12, 14, 18, and 24, FPL’s projection of a slight decrease in FPL’s system-wide GHG emissions from replacing Units 4 and 5 with Unit 7 must be rejected. Paragraphs 248 and 249, which rely on that projection, must also be rejected in their entirety.

30. **Paragraph 250**

Paragraph 250 repeats errors that for the reasons previously discussed in Exceptions 1, 23, and 27 must be corrected, as follows:

> 250. Other measures, discussed above, that DBEC will include and implement to minimize offsite impacts include using the existing transmission line system, existing natural gas pipeline, existing site access, and using a previously-developed power generation site. DBEC will not require new water sources, will not result in a new or expanded surface water discharge, and will reduce the use of processed water by approximately 22 percent. Additionally, upon its operation, DBEC will provide a warm water refuge for manatees.56/

31. **Paragraph 251**

Because Paragraph 251 relies on all of the prior error-filled paragraphs to find that Unit 7’s benefits outweigh its adverse impacts, this paragraph must be rejected.

32. **Paragraph 259**

The Judge wrongly decided to strike Paragraphs 6 and 7 of Sierra Club’s Statement on Relief (“Statement on Relief”) and reiterated that decision in Paragraph 259 of the RO. The latter must be rejected as an erroneous legal conclusion, mislabeled as a finding of fact.

Paragraph 6 of the Statement on Relief asks the Board to impose a condition that FPL locate Unit 7 so as to minimize climate damages to Unit 7 itself. This condition is grounded in the plain language of section 403.509(3), Fla. Stat., that the Board “shall consider whether, and
the extent to which, the location, construction, and operation of the electrical power plant” will meet certain statutory standards, including the minimal-adverse-effects standard in (3)(f) and the standard to “[m]eet the electrical energy needs of the state in an orderly, reliable, and timely fashion” in (3)(d). As such, the Board, not the Judge, has the “ultimate authority” to decide whether to impose Sierra Club’s proposed condition. Indeed, power plant siting cases establish that the Board has broad powers to impose conditions, even ones “other than those listed in the PPSA.” Miami-Dade Cty. v. Fla. Power & Light Co., 208 So. 3d at 119.

As an alternative to the condition in Paragraph 6, Paragraph 7 of the Statement on Relief asks the Board to impose a condition that requires FPL to bear the financial risk of constructing and operating Unit 7 at FPL’s proposed site. The Judge wrongly concluded that this requirement would interfere with the PSC’s electric utility ratemaking. Ratemaking is the act of deciding whether costs incurred by a utility may be passed onto the public via rates. Requiring that FPL bear the financial risk of potential catastrophic losses from its proposed location does not interfere with ratemaking. Miami-Dade Cty. v. Fla. Power & Light Co., 208 So. 3d at 119 (“The Siting Board’s power in no way infringes on the PSC’s authority with regard to rate-making, and there is no conflict with the PSC’s role.”). To be sure, just like any other condition imposed by the Board that results in a utility incurring costs, under this condition, it would still be the PSC that parses what costs incurred by FPL are or are not ultimately eligible for rate recovery from the public. But, crucially, this requirement would protect the public against moral hazard, by incentivizing FPL to fully evaluate the costs and risks of its proposed site before proceeding to locate Unit 7 there, and to take out appropriate insurance to manage those costs and risks. As these are policy considerations, the Board, not the Judge, should decide them.

For the foregoing reasons, Paragraph 259 of the Recommended Order must be rejected.
33. **Paragraphs 298**

The Judge’s conclusion in Paragraph 298 that Unit 7 will “result in a net environmental benefit as compared to the alternative of continuing to operate Units 4 and 5 indefinitely into the future” must be rejected. This conclusion rests entirely on FPL’s projection of slight decrease in system-wide GHG emissions—a projection that is contrary to law and policy, and is not supported by competent, substantial evidence for the reasons discussed in the foregoing exceptions. Therefore, Paragraph 298 must be struck entirely.

34. **Paragraphs 300 to 302**

Under section 403.509(3)(a), the Judge’s conclusion that “DBEC has provided reasonable assurance that its operational safeguards are technically sufficient for the public welfare and protection” must be rejected. RO ¶ 300. This conclusion wrongly ignores the competent, substantial evidence in the record that FPL failed to address the substantial risk that the existing structures—equipment needed for Unit 7 to operate—not to mention the adjacent neighborhood and access roads, will be inundated by corrosive salt water from sea level rise and storm surges. See SC PRO FOF ¶¶ 158-62 (citing the evidence). Paragraphs 300 to 302 therefore must be rejected. Instead, the Board should adopt the conclusion proposed by Sierra Club. See SC PRO COL ¶¶ 37-47.

35. **Paragraph 317**

Like Paragraph 77, Paragraph 317 wrongly includes a blanket statement that Unit 7 will “comply with all applicable environmental regulatory requirements,” without recognizing that the Siting Act establishes such requirements that are distinct from those in the predicate permits. Therefore, Paragraph 317 must be rejected in its entirety.
36. **Paragraph 318**

There is no competent, substantial evidence for the conclusion that “DBEC will result in a net reduction in GHGs on a system-wide basis over a 30-year horizon.” Rather, this conclusion rests entirely on FPL’s projection of slight decrease in system-wide GHG emissions—a projection that is contrary to law and policy, and is not supported by competent, substantial evidence for the reasons discussed in the foregoing exceptions. Therefore, Paragraph 317 must be struck entirely.

37. **Paragraph 319**

In Paragraph 319, the Judge’s interpretation that “evaluating the impact of sea level on the power plant facility itself is not part of the analysis under section 403.509(3)(e)” is due no deference. See Pub. Emp. Relations Comm’n., 467 So. 2d. at 989. Failures at the plant from flooding certainly could lead to environmental contamination, and this policy consideration is for the Board, not the Judge to decide. Likewise, for the reasons discussed in Exception 127, whether the power block would be sufficiently elevated to withstand flood risk is for the Board to decide. Instead, the Board should adopt Sierra Club’s proposed recommendation on this point of law, see SC PRO COL ¶¶ 21-27, and modify Paragraph 319 as follows:

319. Further, evaluating the impact of sea level rise on the power plant facility itself is not part of the analysis under section 403.509(3)(e), which analyzes the “air and water quality, fish and wildlife, water resources, and other natural resources of the state resulting from the construction and operation of the facility.”

38. **Note 61**

The Judge wrongly interpreted section 403.511(4), Fla. Stat., to bar the Board’s consideration of the costs borne by the public due to Unit 7’s massive adverse effects. Such costs are not solely a consideration in the PSC’s ratemaking. As explained in Exception 32, the PSC’s
ratemaking is limited to whether costs incurred by a utility should be passed onto the utility’s customers through their utility rates. The costs at issue here are not merely those that FPL will incur, but also those that the residents of the adjacent neighborhood and the rest of Southeast Florida will incur, because they are “particularly vulnerable” to climate losses due to sea level rise. RO ¶ 185. Accordingly, Note 61 must be rejected in its entirety.

39. **Paragraph 321**

As discussed in the foregoing exceptions, the air permit never contemplated whether alternate technologies such as solar could or should minimize Unit 7’s massive adverse effects. See Arif, SC-85 T.43:24 to 44:6 (confirming that DEP only considered a limited subset of alternate energy technologies, and only for the limited purpose of lowering Unit 7’s emission rate, not for minimizing its adverse effects). Minimization of adverse effects falls to the Siting Board. § 403.509(3), Fla. Stat. The Judge’s conclusion that the Board must defer to whatever DEP decided in the air permit is thus wrong as a matter of law. Paragraph 321 must be rejected.

40. **Paragraphs 322**

The Siting Act and power plant site certification cases establish the Board’s authority to impose conditions that are not pre-authorized by the PSC. See § 403.509(3)(a)-(g), Fla. Stat.; Miami-Dade Cty. v. Fla. Power & Light Co., 208 So. 3d at 119 (noting that Board’s broad powers to impose conditions did not conflict with the PSC’s role); see also Seminole Electric Co-op. v. DEP, 985 So.2d 615, 619 (Fla. 5th DCA 2008) (ordering certification of power plant upon conditions, including the applicant’s commit to “purchas[e] and distribut[e] low-energy, fluorescent light bulbs; committed to a program to develop additional renewable energy resources to offset . . . future electrical demand needs; and also . . . additional air emission
reductions [beyond those in the air permit]). The case cited by the Judge in Paragraph 322 is not to the contrary; rather, it is an instance where FPL itself favored such a condition.

Additionally, alternate energy technology projects such as solar projects that are less than 75 megawatts (“MW”) are not subject to a PSC need determination, because the Siting Act’s definition of covered power plants only includes plants that are 75 MW or more. See § 403.503(14), Fla. Stat. Indeed, FPL routinely builds 74.5 MW projects for that very reason. But, whatever the amount of alternate energy technologies that the Board decides is necessary to minimize Unit 7’s massive adverse effects, thereafter FPL can always submit its proposed alternate energy technology projects for PSC review thereafter. Id. (“‘Electrical power plant’ means, for the purpose of certification, any steam or solar electrical generating facility using any process or fuel . . . except that this term does not include any steam or solar electrical generating facility of less than 75 megawatts in capacity unless the applicant for such a facility elects to apply for certification under this act.”) (emphasis added).

As such, Paragraph 322 must be rejected.

41. Paragraphs 323

Whether and on what conditions the certification of Unit 7 “effects a reasonable balance between the need for the facility and the environmental impacts considered under section 403.509(3)(e)” is a question of law and policy for the Board, not the Judge, to decide. And for the reasons discussed in the foregoing exceptions, the Judge’s opinion must be rejected. Instead, the Board should adopt the conclusions on this issue proposed by Sierra Club. See SC PRO COL ¶¶ 21-27.

42. Paragraphs 324 to 330

What “reasonable and available methods” FPL must use to “minimize” Unit 7’s massive adverse effects is a question of law and policy for the Board, not the Judge, to decide. And for
the reasons discussed in the foregoing exceptions, the Judge’s opinion reflected in Paragraphs 324 to 330 must be rejected. Instead, the Board should adopt the conclusions on this issue proposed by Sierra Club. See SC PRO COL ¶¶ 28-36.

43. **Paragraphs 331 to 334**

Whether and on what conditions certification of Unit 7 will “serve and protect the broad interest of the public” is the arguably the ultimate question of law and policy; it, too, is for the Board, not the Judge, to decide. In reaching this decision, the “Siting Board must necessarily subject a proposed certification to scrutiny with an eye towards the long-term social and environmental effects, positive and negative, expected to be associated with power plant operations. This approach necessarily involves a broader perspective than the review of an application by the ‘party agencies’ for the technical areas within the delegated jurisdiction of each.” AES Cedar Bay, Inc. v. Dept. Env. Reg., Case No. 88-5740, 1991 WL 161055, at *2-3 (Fla. DOAH Dec. 5, 1990; Fla. DER Feb. 11, 1991). For this reason, and the reasons enumerated in the foregoing exceptions, the Judge’s opinions in Paragraphs 331 to 334 must be rejected, because it wrongly rests on the predicate permits, without the additional scrutiny that is inherently necessary in the Board’s final, administrative disposition of this case. Instead, the Board should adopt Sierra Club’s recommended conclusions. See SC PRO COL ¶¶ 48-59.

44. **Paragraphs 336 through 358**

Precisely because the Siting Act commits the final, administrative disposition of this case to the Board and not the Judge, the Judge’s opinions on the relief requested by Sierra Club in its Statement of Relief are due no deference. Because the opinions flow from multiple errors of law, fact, and procedure as discussed in the foregoing exceptions, Sierra Club’s recommended conclusions should be adopted instead. See SC PRO Relief ¶¶ 1-2.
CONCLUSION

Because the Judge misapplied the minimal-adverse-effects standard, wrongly excluded evidence on measures to minimize adverse effects, and impermissibly ceded decisions to other agencies on issues that were not before them, the Judge’s recommendation to certify Unit 7 cannot stand.

As the Judge herself found, there is “compelling” evidence on the “need to exigently address” climate change, RO n. 28, especially because Southeast Florida is so “vulnerable” to climate losses, RO ¶ 185. Further, she found legally sufficient evidence that Unit 7’s share of climate losses would lead to such harms as: contamination of drinking water aquifers, property damage due to flooding and increased storm intensity, adverse impacts on recreational activities due to degradation of coral reef and mangrove ecosystems, algal blooms, and human health impacts. Compare RO ¶ 255 (describing harms alleged by Sierra Club) with RO ¶ 267 (concluding “Sierra presented evidence sufficient to establish that, if it were correct in its allegations regarding the effects of DBEC on climate change, [Floridians] reasonably could be injured.”). Indeed, regarding Unit 7’s share of climate losses, the Judge correctly found:

- FPL proposes to generate energy by burning fossil fuel at Unit 7, RO ¶ 15, and therefore Unit 7 will emit carbon dioxide and methane, RO ¶ 51, which are among the “most significant contributors” to climate change. RO ¶ 175.
- The estimated “monetary impact to Florida’s economy from climate change may be between $500 million to $1.1 trillion annually by 2100.” RO ¶ 92.
- “[I]t is possible to arrive at estimates that represent a ‘floor,’ or minimum value, of damage due to GHG emissions from a specific project.” RO ¶ 91.
- By one such estimate, the cost to Florida of Unit 7’s emissions ranges “from $8.4 million
and $27 million per year.” RO ¶ 93.

- By another estimate, the cost of Unit 7’s emissions “would range from $213 million to $289 million on an annual basis.” RO ¶ 91.

Thus, when the Judge recommends that Unit 7 should be certified—without any inquiry into measures such as solar additions that undisputedly can significantly decrease the GHG emissions from fossil fuel-burning power plants like Unit 7—there simply is no basis in the law or the record to adopt that recommendation. Rather, the Judge rests her recommendation on predicate permits, which never applied the minimal-adverse-effects standard that governs the final, administrative disposition of this case. And she rests her recommendation on the unfounded assumption that the one and only alternative to Unit 7 is to continue to operate the existing, 70-year old Units 4 and 5 indefinitely (an alternative that the PSC specifically rejected as infeasible). Only a tortured reading of minimal-adverse-effects standard, would grant FPL a certification for Unit 7 against the record of staggering losses to Floridians from doing so.

Ultimately, the Board is responsible for applying the correct legal standard, consistent with the Legislature’s intent and objectives. Pub. Emps. Relations Comm’n. v. Dade Cnty. Police Benevolent Ass’n., 467 So. 2d 987, 989 (Fla. 1985) (emphasis original). As such, the Board should either: deny the certification of Unit 7; condition certification on the measures proposed by Sierra Club to reduce Unit 7’s massive adverse effects, see SC PRO Relief ¶ 2; or remand this matter with instructions for the Judge to take evidence on measures such as additional solar that undisputedly can significantly decrease the GHG emissions from fossil fuel-burning power plants like Unit 7.
RESPECTFULLY SUBMITTED this 14th day of August, 2018.

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CERTIFICATE OF SERVICE

I hereby certify this 14th day of August, 2018 that a true and correct copy of the foregoing has been served by electronic mail upon the following:

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